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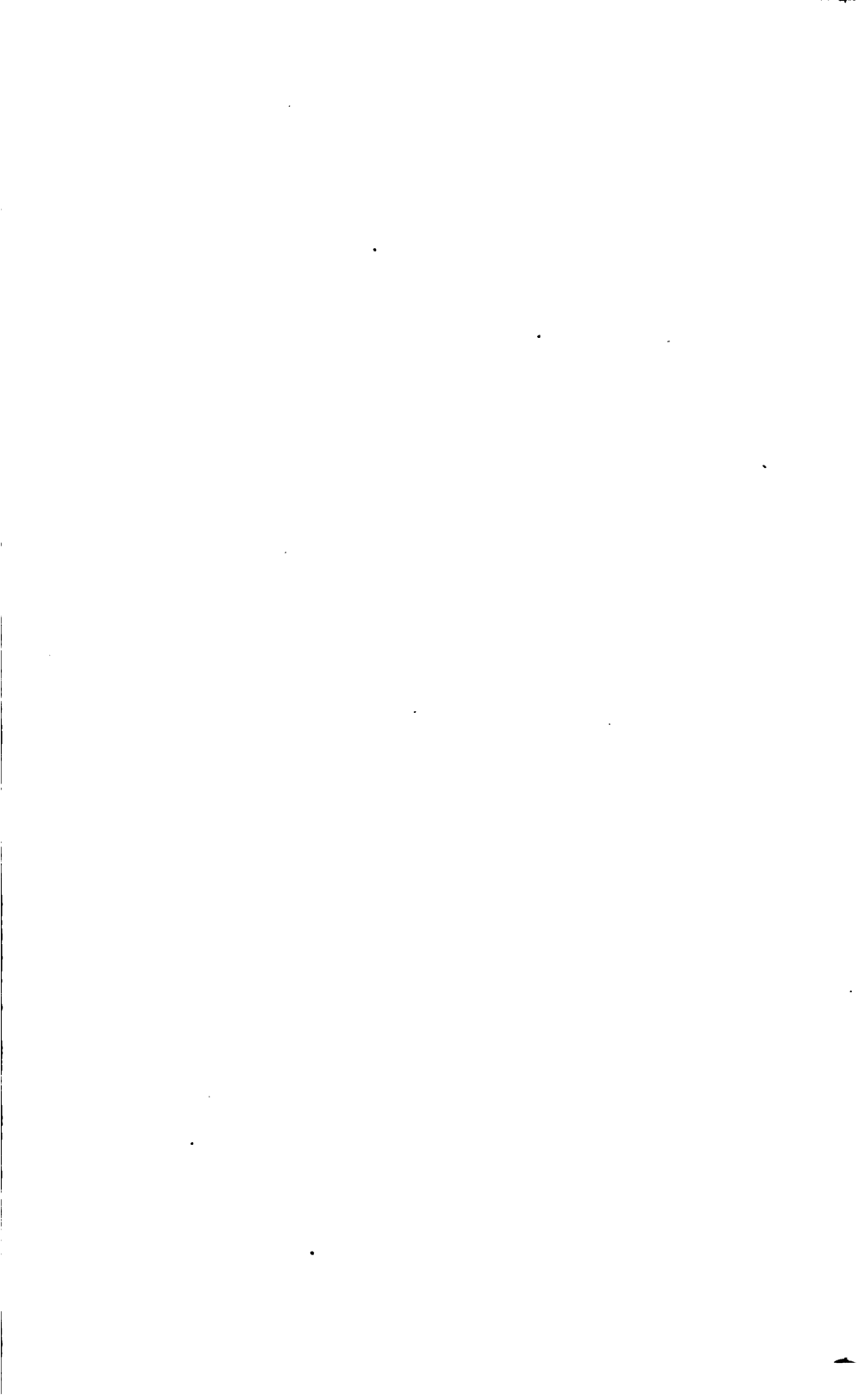
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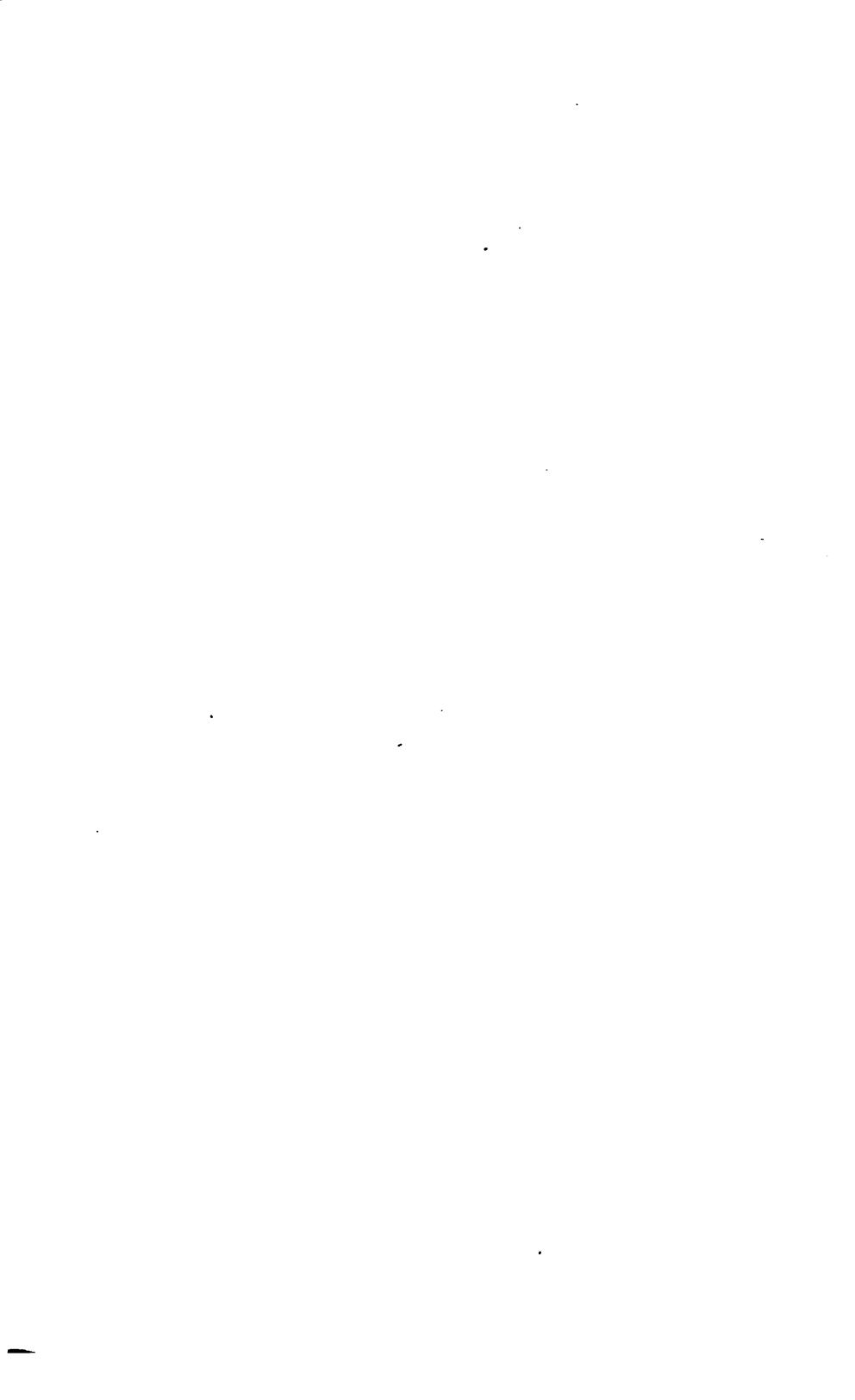
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Woods







THE
ONTARIO REPORTS,
VOLUME XXXI.

CONTAINING
REPORTS OF CASES DECIDED
IN THE
HIGH COURT OF JUSTICE FOR ONTARIO.

WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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MEMORANDUM.

On the 3rd of July, 1900, the HONOURABLE WILLIAM GLENHOLME FALCONBRIDGE, one of the Justices of the High Court, was appointed Chief Justice of the Queen's Bench in the place of the HONOURABLE JOHN DOUGLAS ARMOUR, appointed Chief Justice of Ontario.

ERRATA, ETC.

Page 426, line 6 of head-note, for "breach" read "stipulation."

Page 448, line 3 from end of head-note, for "sec. 4" read "sec. 14."

Page 457, head-note, 2nd line, insert between the words "complaint" and "against" the words "for an offence."

Page 485, last line, for "support" read "oppose."

Page 494, line 6, for "Mr." read "Mrs."

Page 636, head-note, and Page 638, line 12, for "section 75" read "section 76."

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[DIVISIONAL COURT.]

FOSTER V. TORONTO RAILWAY COMPANY.

Trial—Good Friday—Dies Non Juridicus.

The evidence at the trial of this action not being concluded before the close of the day preceding Good Friday, the Judge, counsel consenting and the jury desiring it, adjourned the Court to the following day, when he delivered his charge and received the verdict, on which he entered judgment :—

Held, that it was competent for him to do so.

The only day on which no judicial act can be done in this Province is the Lord's day, or Sunday. Other statutory holidays are not *dies non juridici* in this sense.

THIS was a motion by the plaintiff to set aside the judgment for the defendants entered at the trial of this action, which was brought to recover damages in respect to injuries alleged to have been sustained by the plaintiff through the negligence of the defendants. Statement.

The trial took place before MEREDITH, C. J., and a jury, at Toronto, and commenced on March 30th, 1899. The taking of evidence occupied the whole of that day, and the Court adjourned until 2 p.m. on the following day, which was Good Friday, when the learned Chief Justice delivered his charge to the jury, and upon their findings entered judgment as above mentioned.

Statement. The present motion was rested upon the ground, as stated in the notice of motion, that "the verdict of the jury and the judgment entered thereon were null and void, for the reason that part of the trial of the action was held on a day which was a non-juridical day, and the verdict of the jury and the judgment in the action were given and rendered on a non-juridical day."

The motion was argued on June 14th, 1899, before BOYD, C., ROBERTSON, and MEREDITH, JJ.

W. R. P. Parker, for the plaintiff, contended that had the proceedings taken place on Sunday the judgment would have been void: *Swann v. Broome* (1764), 3 Burr. 1595; and that this was solely by reason of the provisions of certain mediæval canons, which prescribed numerous other days as well: 3 Blacks. Com. Lewis ed. 275. A new list of days was substituted by 5 & 6 Edward VI. ch. 3, now superseded by R. S. O. ch. 1, sec. 8, sub-sec. 16. The statute by making these days "holidays" *ipso facto* makes them *dies non juridici*: *Lampe v. Manning* (1875), 38 Wis. 673. He also referred to *Foster v. Usherwood* (1877), 47 L. J. 30; *Regina v. Murray* (1897), 28 O. R. 549; *In the Matter of the Election for the West Riding of the City of Toronto* (1871), 31 U. C. R. 409; *Wilson v. Gould* (1870), 2 Ch. Ch. 236; *McCaw v. Ponton* (1886), 11 P. R. 328; *Brunker v. The Corporation of the Township of Mariposa* (1892), 22 O. R. 120, especially at p. 125; *Harrison v. Smith* (1829), 9 B. & Cr. 243; Article on *Dies non Juridicus*, 7 Southern Law Rev., at p. 712; and Adams, Sweet, and Wharton's Law Dictionaries, *sub voce Dies non Juridicus*.

Bicknell, for the defendants, referred to the Interpretation Act, R. S. O. ch. 1, sec. 8, sub-sec. 16; and contended there was no statutory prohibition against what was done here, though it might be that no formal deliverance might be drawn up on a *dies non juridicus*.

The judgment of the Court was delivered on June 22nd, 1899, by

Judgment.
Boyd, C.

BOYD, C.:—

It is held in *Lampe v. Manning* (1875), 38 Wisc. 673, cited for the plaintiff, that the term "holiday" used in a statute means *dies non juridicus*, and that such being the case the Court had no power to hear a cause and render judgment on such a day. This I conceive to be an entirely erroneous view of the word, first of all translating it into a dead language and then imputing to it an ecclesiastical meaning which is foreign to the atmosphere of a new country where no established church exists. "Holiday," according to the Oxford dictionary means, first, a consecrated day, a religious festival, and second, a day on which the ordinary occupations are suspended, a day of exemption or cessation from work, a day of festivity, recreation or amusement: see *Phillips v. Innes* (1837), 4 Cl. & Fin. 234.

Again, in *Brunker v. The Corporation of the Township of Mariposa* (1892), 22 O. R. 120, at pp. 125-6, it is said, "The Interpretation Act, R. S. O. ch. 1, sec. 8, sub-sec. 16, provides that 'holiday' shall include Christmas and New Year's Days, i.e., these days are non-judicial days or days on which the law is not administered, or upon which the Court cannot do any judicial act," citing *Harrison v. Smith* (1829), 9 B. & Cr. 243. In the case cited it is said, at p. 244: "There are certain days, as well as Sundays, which are *dies non juridici*. On these days the Court cannot do any judicial act."

No doubt in England there are many days canonically declared to be *dies non juridici* the same as Sunday; but in this country the only day on which no judicial act can be validly done is the Lord's Day or Sunday. This does not result from Sunday being a statutory holiday, but because it is *dies non juridicus* as declared by early canons of the Church adopted or confirmed by the English kings and so

Judgment. incorporated into the common law and as such introduced
Boyd, C. into this Province by its first colonization and constitution. Christmas, Good Friday and the like, are holidays by statute, but they are not on the same footing as to separateness from ordinary or secular work as the Lord's Day, nor are they regarded as religious occasions by a great part of the population.

Though the rules of Court sanction and provide for the closing of the offices on holidays, this is merely for the benefit of the officers and not making void necessarily any business done on those days, *e.g.*, by consent: *Bennett v. Potter* (1832), 2 Cr. & Jer. 622, and Rule 9 with Rules at p. 188 of Holmsted and Langton on the Ontario Judicature Act.

The position of Sunday is exhaustively discussed by Lord Mansfield in *Swann v. Broome* (1764), 3 Burr. 1595 ; S. C., 1 W. Bl. 496 and 526. He cites Coke, who says, "In the common law there be *dies juridici*, and *dies non juridici*. *Dies non juridici sunt dies dominici*, the Lord's Days throughout the whole year."

The decisions as to what may and may not be done on Sundays are not relevant to the question in this case which turns upon the effect of going on with the trial of a case on Good Friday, both counsel consenting and the jury desiring it. That is a perfectly proper and competent thing to do so far as legal validity of the proceeding is concerned. The presiding Judge will not of course interfere with the wish of any one to attend divine worship on that day, but all parties interested consenting there is no want of jurisdiction to proceed with the trial to its conclusion.

Special reasons exist for the observance of Sunday as a "holy day" founded on the Divine law, which are not by all considered applicable to other days called holidays, especially in a country where there is no church by law established. I quite agree with the reasoning found in the recent decision of *Didsbury v. Van Tassell* (1890), 63 N. Y. (56 Hun) 423.

The same great Judge who respected the sanctity of the Lord's Day did not attach the same importance to religious holidays. As reported by Sergeant Woolrych, Lord Mansfield even ordered the doors of his Court to be thrown open on Ash Wednesday, and emboldened by success, it is said the Chief Justice proceeded to suggest business on Good Friday, whereupon the memorable *mot* was uttered by Sergeant Davy that if his Lordship did so he would be following the precedent of Pontius Pilate: *Lives of Eminent Sergeants-at-law* by Woolrych, vol. ii., p. 624. And it is recorded in the *Law Magazine* among the events of 1831, that Lord Brougham had sat on Easter Saturday and Easter Monday too: vol. vi. O. S., p. 514. I think the law is well summed in Freeman on Judgments, 4th ed., vol. i., sec. 138. Holidays other than Sundays are not non-judicial days unless expressly made so by statute, and judgments rendered thereon are valid.

All other points were ruled upon adversely to the appellant and this last he cannot rely upon.* The judgment is therefore affirmed.

A. H. F. L.

*The only ground seriously argued was the one with which the above judgment is concerned.—R.E.P.

POLSON V. THE MUNICIPAL CORPORATION OF THE TOWN
OF OWEN SOUND.

Municipal Corporations—R. S. O. ch. 184, sec. 366—By-law Exempting from Taxation—Manufacturing Establishment—Cessation of Business.

R. S. O. ch. 184, sec. 366, which gives municipal councils power to exempt manufacturing establishments from taxation, does not authorize such exemption when such establishments cease under liquidation to carry on business, and any exempting by-law will, in such event, cease to be operative.

Statement.

THIS was an action brought to recover back from the defendants the amount of certain taxes paid under the circumstances stated in the judgment.

The trial took place at Owen Sound on June 3rd, 1899, before MACMAHON, J.

J. H. Moss, for the plaintiffs, contended that the defendants were trying to add on to the agreement of July 18th, 1898, such words as "providing the company continue to carry on such business for ten years," which they could not do; and cited *Watt v. City of London* (1892-3), 19 A. R. 675, 22 S. C. R. 300; *Nickle v. Douglas* (1875), 37 U. C. R. 51; *Alexander v. Corporation of Village of Huntsville* (1894), 24 O. R. 665; *The People's Milling Co. v. Council of Meaford* (1885), 10 O. R. 405; *Cooley on Taxation*, 2nd ed., p. 66; R. S. O. 1887, ch. 184, sec. 366.

W. J. Hutton, for the defendants, contended that the by-law was bad *ab initio* because it did not contain a savings clause, and cited *In re Denne and the Corporation of the Town of Peterborough* (1885), 10 O. R. 767; *Scott v. Corporation of Tilsonburg* (1886), 13 A. R. 233; *Scragg v. Corporation of City of London* (1867), 26 U. C. R. 263; *Pirie v. Corporation of the Town of Dundas* (1869), 29 U. C. R. 401; *Corporation of the City of Toronto v. The Great Western R. R. Co.* (1866), 25 U. C. R. 570; 55 Vict. ch. 42, sec. 366 (O.); R. S. O. 1897, ch. 223, sec. 411.

June 29, 1899. MACMAHON, J.:—

Judgment,

MacMahon,

J.

The action is brought by the plaintiffs to recover \$628.26, being the taxes assessed against lots 7, 8, 9 and 10 on the Bay Shore road in the town of Owen Sound, containing seven acres, more or less, for the years 1893 to 1896 inclusive, amounting to \$571.24, and the percentage thereon, amounting to \$57.12. This sum of \$628.36 was paid by the plaintiffs under protest on April 29th, 1898.

By an agreement dated July 18th, 1888, between the corporation of the town of Owen Sound and the Polson Iron Works Company of Toronto, Limited, for the purpose of inducing the said company to establish an iron and steel ship building yard and other manufacturing industries at the town of Owen Sound, the corporation of the said town, agreed to furnish the Iron Works Company with a site therefor (being the lands already referred to), and to exempt said site from municipal taxes for ten years. And it was further agreed that if at any time the company desired to obtain an absolute title to the said lands without any conditions or limitations as to the uses to be made thereof, they should be entitled to the same on repayment to the town of the sum of \$1,850 (being the amount paid by the town therefor) and interest thereon from the date of the said agreement at six per cent.

By deed, bearing date the same day, from Duncan Morrison, the then mayor of Owen Sound (in whose name the conveyance of the said lands had been taken by the corporation), to the Polson Iron Works Company, it is recited that for the purpose of inducing the Iron Works Company to establish an iron and steel ship building yard and other manufacturing industries at Owen Sound, the corporation of the town had agreed, amongst other things, to furnish a site therefor, and had purchased said site in the name of Duncan Morrison, the lands already described.

It is then witnessed that in consideration of the premises the said Duncan Morrison doth grant "to the Polson Iron Works Company, their successors and assigns, to and for

Judgment. the uses of an iron and steel ship building yard or such
MacMahon, other manufacturing purposes as they may see fit.”
J.

In accordance with the agreement between the parties, the corporation of Owen Sound, on July 30th, 1888, passed by-law No. 478 to exempt the Polson Iron Works Company, Limited, at Owen Sound from taxation. The by-law recites that the Polson Company are establishing at Owen Sound on the said lands an iron and steel ship building yard, under an agreement with the town that the same should be exempt from taxation for the term of ten years. The by-law then enacts: “That the said iron and steel ship building yard, consisting of the said land and all the buildings, machinery, plant, and material thereof, and all the manufacturing establishments erected or to be erected or placed thereon shall be and they are hereby exempted from municipal taxation in the town of Owen Sound for and during the term of ten years, commencing with the present year.”

The Polson Company erected on the land the necessary buildings and established an iron and steel ship building yard thereon, the works in connection with which were continued until October, 1892, when operations ceased, and by the first of December all the machinery and plant in connection with the works, were removed from the buildings and taken to Toronto.

A winding-up order was obtained for the winding-up of the business of the Polson Iron Works Company on the 8th of February, 1893, and E. R. C. Clarkson was appointed liquidator; and on April 7th, 1893, Clarkson conveyed the lands and premises already referred to to the plaintiffs herein.

In consequence of the cessation of the works, the premises on which the works were carried on, were assessed in 1893 to Clarkson, and notice of assessment was sent to him on May 4th. In 1894 the assessment was made against the Polson Iron Works Company, and notice sent to the company on May 2nd. In 1895 the assessment was against the Polson Iron Works Company, Toronto, and notice sent to the plaintiffs, F. B. Polson and J. B.

Miller, on May 2nd, 1895. In 1896 the assessment was to the Polson Iron Works Company and F. B. Polson and J. B. Miller, and notices were sent to them on April 30th. Judgment.
MacMahon,
J

The rolls were duly returned and there were no appeals against any of the assessments.

The lands had been advertised for sale and sold for taxes, and the amount paid by the plaintiffs was paid for the purpose of redeeming the lands. Therefore, no question as to any irregularity in the assessment, or as to want of notice of the assessments, could arise.

The Act in force when this by-law was passed was R. S. O. 1887, ch. 184, sec. 366, which only gave to municipal councils power of exempting any manufacturing establishment or any waterworks, or water company, from taxation.

Under the by-law it could only be during its continuance as a manufacturing establishment that the works would be exempt. When the Polson Company ceased to manufacture, the establishment ceased to be a "manufacturing establishment" as effectually as if the buildings, machinery and plant had been destroyed by fire. The right of exemption was put an end to by such cessation, and it was not necessary for the council to pass a by-law repealing by-law 478 before assessing the property.

In the view I have taken, it is not necessary to fully consider the question argued by Mr. Hatton as to by-law 478 being void *ab initio*. It may be that the agreement which refers to the establishment by the Polson Company of a steel ship building yard "and other manufacturing industries," when read with the operative part of the by-law freeing the steel ship building yard and all the buildings, machinery, plant and material thereof, "and all the manufacturing establishments erected or to be erected thereon," causes the by-law to be tainted with the vice which rendered nugatory the by-law in *The People's Milling Co. v. Council of Meaford* (1885), 10 O. R. 405.

There must be judgment for the defendants, dismissing the action with costs.

A. H. F. L.

[DIVISIONAL COURT.]

ROBERTS V. TAYLOR.

Master and Servant—Factories Act—Child Labour—Accident—R. S. O. ch. 256, secs. 5, 7, 8, 9.

The employment of a child under fourteen years of age in a factory at work other than of the kinds specified in section 5 of the Factories Act, R. S. O. ch. 256, as proper for children, though it subjects the employer to a penalty, does not give rise to an action for damages, unless there be evidence to connect the violation of the Factories Act with the accident.

Statement. THIS was an action to recover damages for an accident alleged to have been sustained by the plaintiff from the negligence of the defendants, and was tried before MACMAHON, J., and a jury, at Toronto, on April 8th, 1899, when the plaintiff was nonsuited.

The plaintiff now moved to have the nonsuit set aside, and for a new trial, on the grounds that the evidence disclosed that the defendants employed the plaintiff, who was an infant of twelve years of age, to work at a circular saw; that at common law, the fact of employment of a person of tender years to work a dangerous machine may *per se* constitute negligence, and it should have been left to the jury to say whether or not, under the circumstances disclosed in evidence, the employment in this case constituted negligence on the part of the defendants; that the employment of the plaintiff constituted a breach of the Factories Act, and was therefore negligence, which should have been submitted to the jury; and that on the facts disclosed in evidence the question of contributory negligence on the part of the infant plaintiff could not arise, or if it did, it was a question which should have been submitted to the jury.

The motion was argued on June 15th, 1899, before BOYD, C., ROBERTSON, and FALCONBRIDGE, JJ.

G. Wilkie, for the plaintiff, argued that by common law there was an extra duty cast upon employers of child labour, as, for example, to instruct the child in the character of the work, and shew how the dangers could be avoided: *Beven's Law of Employers' Liability*, 2nd ed., p. 31; it was the duty of the employer to ascertain the child's age: *Gibb v. Crombie* (1875), 2 Rettie 886; *Blamires v. The Lancashire & Yorkshire R. R. Co.* (1873), L. R. 8 Ex. 283; the Factories Act did not permit the employment of children in this manner: *Finlay v. Miscampbell* (1890), 20 O. R. 29; *Thompson v. Wright* (1892), 22 O. R. 127; *O'Brien v. Sanford* (1892), 22 O. R. 136; *Beven, ibid.* at pp. 18, 19, 49, 130; *McCloherly v. The Gale Manufacturing Company* (1892), 19 A. R. 117; the reason of its provisions was because children are apt to be negligent, so that it is not open to the defendants to allege contributory negligence: *Sharp v. The Pathhead Spinning Co.* (1885), 12 Rettie 574; *Crocker v. Banks* (1888), 4 Times L. R. 324; at any rate to establish such a defence it must be shewn that the boy had intelligence to understand the danger and capacity to avoid it: *Beven, ibid.* at p. 76.

R. McKay, for the defendants, contended that the machine was a safe one to handle, and that the work was simple, and the boy understood it thoroughly; that there was no suggestion of defect in the machine or in the instructions; that to employ the boy in the manner here done in breach of the Factories Act did not in itself constitute negligence on the authorities: *Montreal Rolling Mills Co. v. Corcoran* (1896), 26 S. C. R. 595; that the Factories Act is a police regulation Act and provides its own penalties for breach of its provisions: *O'Brien v. Sanford* (1892), 22 O. R. 136; that the failure to give instructions was certainly not the cause of the accident, for the boy said he knew all about the machine.

The judgment of the Court was delivered on July 4th, 1899, by

Judgment. BOYD, C.:—

Boyd, C.

It cannot be said that the machine at which the plaintiff was put to work was dangerous, or not sufficiently protected, or that with ordinary care there was any risk in doing the work assigned.

Nor can it be said that the plaintiff was not sufficiently informed as to the manner of doing the work. It seems to be a simple operation, easily done by any handy youth, such as the plaintiff appears to be.

Nor can it be found upon the evidence that the injury arose from the immature age of the plaintiff, rendering the work too exacting or exhausting for him. He appears to have undertaken the work understanding what he had to do, and apt enough to do it with ordinary care. He had competent knowledge of the danger to be avoided, and could not have been hurt had he not allowed his finger to get into the slot beneath which the saws work—a place intended for the strips of board, and into which he had no call to put his hand.

The injury appears to be the result either of carelessness or accident for which an adult could not sue.

Then how is the situation different because of his infancy, or because of his being under the lawful age of employment? There is no evidence that the age was asked by or known to the defendants. No doubt this plaintiff was under fourteen years of age, and should not have been employed at work in the defendants' factory. The statute says that no child shall be employed in the factory except at certain kinds of work (under which the work in question does not fall), and child is defined as a person under fourteen: R. S. O. 1897, ch. 256, sec. 2, sub-sec. 5, and sec. 5. But though this subjects the employer to a penalty, it does not give rise to a civil action for damages, unless there is evidence to connect this violation of the Factory Act with the accident. The work assigned may be too dangerous for a child, or too exhausting in its demands, so that what an older person might do would

overtask the child and so contribute to the injury. But **Judgment.**
no such case is made, coupling the accident with the illegal **Boyd, C.**
employment, either in the pleadings or upon the evidence :
see *Groves v. Wimborne*, [1898] 2 Q. B. 402.

And again, in the absence of evidence tending to shew that the infant injured was not competent to understand the situation—the work to be done, the manner of doing it, and the attending risk—and to appreciate the need for due caution according to the circumstances, the Court may infer capacity in the case of a youth of twelve or thirteen who shews intelligence in his manners and his answers. As to crime, fourteen is made the age of responsibility by the Criminal Code, 55-56 Vict. ch. 29, sec. 10. But the infant under that age is liable for a criminal act if he is competent to know the nature and consequence of his act, and to appreciate that it was wrong. The evidence of the plaintiff himself in this case established all that was needed to shew that he was entitled to no greater consideration than an adult suing for a personal injury.

It is needless to accumulate cases, but I may note two or three much in point: *Race v. Harrison* (1893), 9 Times L. R. 567; *Morris v. The Boase Spinning Co.* (1895), 22 Rettie 336; *Lowcock v. Franklin Paper Co.* (1897), 169 Mass. 313.

The motion fails and the judgment should be affirmed.

A. H. F. L.

[DIVISIONAL COURT.]

REGINA V. ELLIOTT.

Criminal Law—Evidence—Questioning Prisoner—Statements while in Custody.

Answers given by a prisoner under arrest in response to the officer in charge, are receivable in evidence, if the presiding Judge is satisfied that they were not unduly or improperly obtained, which depends upon the circumstances of each case.

Statement. THIS was a Crown case reserved by MACMAHON, J., as follows :—

The prisoner was tried before me at the Sittings of the Court of Oyer and Terminer for the county of Ontario, on the 23rd of May, 1899, on an indictment charging him with having on the 12th of November, 1898, at the village of Beaverton, in the said county, murdered one William Murray.

The jury found the prisoner guilty.

Murray was living alone and was murdered in his house. The person who committed the crime, after its commission on leaving the house locked the door forming the only means of ingress and egress to and from the house and carried off the key.

The prisoner was arrested on the night of Tuesday November 15th, by constable Smith, who placed him in the lock-up at Beaverton, and when doing so warned him against saying anything that would criminate him, as, if he did, it might be used in evidence against him.

On the following morning (Wednesday) Smith asked the prisoner where he had put the key. The prisoner, in reply, asked, "What key?" Smith then said, "The key of Murray's house." The prisoner thereupon said, "You could not get it anyway; you could not get your hand in where it is under the sidewalk." Smith then said to him, "You come and get it."

As Smith and the prisoner were going to the place in the sidewalk referred to by the prisoner, they were joined

by Duncan McMillan, the reeve of Beaverton, who had Statement.
been assisting constable Smith in his investigations, and who went with them. McMillan who was undoubtedly a person in authority, warned the prisoner with a like warning to that given by Smith on the previous evening. While Smith and McMillan were returning to the lock-up, McMillan said to the prisoner, "What a terrible thing it was to kill a poor old man." The prisoner replied, "He" (meaning Murray), "said my sister was a bitch, and I hit him with a poker. I hit him two or three times with a stick of wood."

Smith, in giving his account of that conversation, stated that after McMillan had asked the question, and the prisoner had replied that Murray had called his sister a bitch he (Smith) may have asked did he hit him with the poker.

On Thursday, the 17th, while the prisoner was in the lock-up, McMillan asked him if Murray had died easy, to which the prisoner replied, "Yes, he was dead when he left." Prisoner also stated on that occasion that McHattie (a) had left (Murray's house) before he did. McMillan warned the prisoner before asking the question.

On the same day in the lock-up, Smith said to the prisoner, "What did you do with the purse?" (referring to Murray's purse), to which the prisoner replied that it was under the bureau in his father's house.

The prisoner was given the usual warning by Smith prior to this question being asked.

The statements or confessions made by the prisoner to Smith and McMillan, and the replies given by the prisoner to the questions asked by his father, were all voluntarily made, and were not made through the influence of hope or fear exercised by any one in authority.

Acting on the authority of *Regina v. Thompson*, [1893] 2 Q. B. 12; *S. C.*, 17 Cox 641; *Regina v. Miller* (1895), 18 Cox 54; and *Regina v. Day* (1890), 20 O. R. 209, I

(a) McHattie was a friend of the deceased, and the chief crown witness.--REP.

Statement. admitted the evidence above referred to. But as *Regina v. Male and Cooper* (1893), 17 Cox 689, is, as I regard it, at variance with *Regina v. Day*, I reserved for the consideration of the Court for Crown Cases Reserved the question whether the different statements made by the prisoner above referred to, were under the circumstances, receivable in evidence against him on his trial.

The case was argued on June 12th, 1899, before BOYD, C., ROBERTSON, and MEREDITH, JJ.

T. E. Godson, for the prisoner, contended that his client had not been sufficiently cautioned; that there was no right to interrogate him while in custody: *Regina v. Male and Cooper* (1893), 17 Cox 689; *Regina v. Miller* (1895), 18 Cox 54; *Regina v. Gavin* (1885), 15 Cox 656; *Regina v. Toole* (1856), 7 Cox 244; and that *Regina v. Day* (1890), 20 O. R. 209, did not bind this Court.

J. R. Cartwright, Q. C., for the Crown, referred to Joy on Confessions, p. 34; *Rex v. Thornton* (1824), 1 Moo. 27; *Queen v. Johnston* (1864), 15 Ir. C. L. 60; *Queen v. Day* (1890), 20 O. R. 209; *Regina v. Brackenbury* (1893), 17 Cox 628.

The judgment of the Court was delivered on June 22nd, 1899, by

BOYD, C.:—

As to statements made by persons accused while in custody in response to questions put by an officer in charge, the Judges have regarded the matter from three points of view. First, there are those who think the practice so reprehensible that any statements so obtained should not be given in evidence. Others think that while the practice of interrogation is undesirable and not to be encouraged, yet that the answers so obtained cannot be rejected as evidence. And still a third class hold that

this investigation may be so conducted as to be useful and even desirable in the furtherance of justice. The great weight of authority is in support of the conclusion that answers given in response to the officer in charge are to be received as evidence so long as they are not evoked or extorted by inducements or threats. Upon the case referred it is expressly stated that the replies were not obtained by any undue means, and that suffices to justify their reception as evidence. *Regina v. Day* (1890), 20 O. R. 209, is the case settling the law in this Province, and that has been followed with approval by a majority of the Judges in the Appellate Court in the Province of Quebec: *Regina v. Viau* (1898), Q. O. R. 7 Q. B. 362, 379.

Judgment.
Boyd, C.

Since *Regina v. Day* the opinion of the Judges has continued to fluctuate in England. Thus in *Regina v. Brackenbury*, 17 Cox 628 (Feb., 1893), Mr. Justice Day received such evidence; but in *Regina v. Male and Cooper*, 17 Cox 689 (Dec., 1893), Mr. Justice Cave strongly denounced the method and refused to admit the statements. In the last case, that of *Regina v. Miller*, 18 Cox 54 (May, 1895), Mr. Justice Hawkins approves of proper interrogation, and says it is impossible to discover the facts of a crime without putting questions.

The general principle is that admissions made to the officer in charge, even in response to questions, may be received if the presiding Judge is satisfied that they were not unduly or improperly obtained, which depends upon the circumstances of each case: see *Bram v. United States* (1897), 168 U. S. R., at p. 557; and Roscoe's Criminal Evidence, 12th ed., p. 44; and *Rogers v. Hawken* (1898), 33 Eng. L. J. 175.

In the present instance the statements were properly in evidence.

A. H. F. L.

[DIVISIONAL COURT.]

TORONTO AUER LIGHT COMPANY, LIMITED, ET AL.

V.

COLLING.

Patent for Invention—Process and Product—Purchaser of Articles Infringing—Profits and Damages—Accounts—High Court—Final Court of Appeal—Deference to Other Courts—Onus of Proof.

A patent granting the exclusive right of making, constructing, using and selling to others to be used an invention as described in the specifications setting forth and claiming the method of manufacture protects not only the process but the thing produced by that process, and an action will lie against any person purchasing and using articles made in derogation of the patent no matter where they came from : and although the plaintiff cannot have both an account of profits and also damages against the same defendant, he may have both remedies as against different persons (e.g., maker and purchaser) in respect of the same article.

A keeping of the accounts pending the action against the importers does not operate as a license to justify the sale of the articles ; it is only an expedient to preserve the rights of all parties to the close of the litigation.

As the infringing articles were manufactured in the United States and brought into Canada for sale, there was sufficient evidence given that they were made according to the plaintiff's process to throw the onus on the defendants of shewing the contrary.

Although the High Court may be a final Court of Appeal it will defer to previous cases decided affirming the validity of a patent and follow the Court of Appeal in refusing to disturb a decision in the Exchequer Court.

Earlier and later American cases commented on.

Statement. THIS was an appeal from the County Court of the county of York in an action brought by the assignee of a patent right for an alleged infringement.

The Welsbach Incandescent Gas Light Company, Limited, one of the plaintiffs, were the assignees of a patent granting "the exclusive right, privilege and liberty of making, constructing, and using and vending to others to be used in the Dominion of Canada" for fifteen years "a new and useful improvement on illuminant appliance for gas and other burners," and had assigned all their rights therein (except the right to manufacture) for certain territory to their co-plaintiffs, The Toronto Auer Light Company.

The original patent, issued in the year 1886, was for a

new and useful illuminant appliance for gas and other burners, consisting of a cap or hood made of fabric, impregnated with a solution of the oxides of rare earths, and a reissue of the patent, reciting a petition "for the reissue of a patent for an alleged new and useful improvement on illuminant appliance for gas and other burners," had, pursuant to 55 & 56 Vict. ch. 77 (D.), granted "the exclusive right, privilege and liberty of making, constructing, and using and vending to others to be used in the Dominion of Canada the said invention." Statement.

In an action of *Auer Incandescent Gas Light Manufacturing Co., Limited v. O'Brien*, it was decided by the Exchequer Court of Canada that both the process and the product described were new and useful: 5 Ex. C. R., p. 243 (1897).

The same patent was under consideration in an action of *The Welsbach Incandescent Gas Light Co., Limited v. Stannard*, which was tried on the 15th April, 1897, before the Chancellor of Ontario, who followed the decision of Mr. Justice Burbidge in the Exchequer Court in *Auer Incandescent Gas Light Manufacturing Co. v. O'Brien*, and found that the new evidence before him did not lead him to a different conclusion than that arrived at by Burbidge, J., and gave judgment for the plaintiffs, saying: "At present I do not see any reason to differ with the learned Judge of the Exchequer Court. I very willingly accept his conclusions. There will be judgment for the plaintiff with costs following the judgment in the Exchequer Court."

The defendant Stannard appealed against that judgment to the Court of Appeal, and the judgment of that Court dismissing the appeal was delivered on the 14th of March, 1898, by OSLER, J.A., as follows:—

"I have given the evidence and the arguments in this case much consideration. The result at which I arrive is that the case is not fairly distinguishable from that tried before Mr. Justice Burbidge in the Court of Exchequer,

Judgment. and the inclination of my opinion is that that case is well decided.
Osler, J.A.

I am not prepared to differ from the view which that learned Judge took of the several questions there raised, and which were again opened before us as to the validity of the patent, the reissue, the assignment, the infringement, etc.

But even if I entertained more doubt than I do of the soundness of that judgment I should hesitate before giving effect to a different opinion. The case at all events would have to be a very plain one—one, that is in which I thought the judgment of the Exchequer Court plainly wrong—in which I would do so. No doubt we are not in any way bound by the decision of that Court. It is, nevertheless, a Court from which—though a Court of original jurisdiction—an appeal lies just as it does from this Court direct to the Supreme Court.

It seems neither convenient nor desirable that the patent law in one Province should be different from that prevailing at the same time throughout the other Provinces of the Dominion which would be the result were we to differ from the Exchequer Court, the decision of which, as a Federal Court, prevails throughout the Dominion unless differed from in some particular Province or overruled or reversed by the Supreme Court. On the appeal from this Court the parties can raise directly the question of the validity of the judgment of the Exchequer Court in a Court where alone, so far as the Courts of this country are concerned, it can be finally reviewed.

Speaking, therefore, for myself, I am of opinion to dismiss the appeal."

This action was tried before His Honour Judge Morgan, one of the junior Judges of the county of York, on the 12th, 26th, 27th, 28th and 30th days of May, 1898, without a jury.

Hilton, for the plaintiffs.

DuVernet, for the defendant.

The defence was that the patent covered the process Statement. merely and did not cover the mantle itself and the plaintiffs, therefore, could not restrain the use of other mantles, but only the manufacture: that the plaintiffs had elected to take an account in an action against the sellers of infringing mantles: and the defendant having bought pending the keeping of such account, the plaintiffs had no remedy: that the Court had no jurisdiction, the validity of the patent being in dispute: that the mantles were not stamped or marked as required by the Patent Act: that the patent was forfeited by reason of the plaintiffs' refusal to sell at a reasonable price, that the reissued patent was bad in that as it was for the process of manufacturing—the original patent covering the product merely.

Judgment was delivered on the 22nd September, 1898.

MORGAN, Co. J. :—

The defendant herein has raised on the pleadings the validity of the plaintiffs' patent and questions the jurisdiction of this Court to try and determine that issue. It is not necessary for me to determine either question here, as the patent has already been upheld by the judgment of the Supreme Court, and following the judgment of that Court I find for the purposes of this action that the plaintiffs' patent is valid.

I find that the defendant has knowingly infringed the plaintiffs' patent by the purchase and use of infringing mantles, and has used such mantles in connection with fittings, not furnished by the plaintiffs, to produce incandescent light—and generally on the evidence I find for the plaintiffs on the eighth and ninth paragraphs* of their statement of claim.

* 8. Alleging the purchase and use of the infringing mantles.

9. Alleging the refusal after request to discontinue using and to deliver up the infringing mantles.—REP.

Judgment.

Morgan,
Co.J.

I find that the plaintiffs were always ready and willing to sell to the defendant and the public generally, at a reasonable price the incandescent mantles manufactured by them under their patents, either alone or in connection with the attachments used by them in connection with such mantles for the production of incandescent light.

It was contended on behalf of the defendant that the plaintiffs in certain actions brought by them against the vendors of these infringing mantles and attachments elected as against these persons to have an account kept, pending such litigation, of the sales by these vendors of the infringing articles, and that, therefore, the defendant being a purchaser from and user under these vendors the plaintiffs are estopped, by their election and the order of the Court directing the account to be kept, from claiming damages against the defendant as a purchaser and user.

I am unable on the evidence, and as I view the law, to give any effect to this contention.

I find that the defendant purchased and used five of the infringing mantles and attachments, and I assess the damages of the plaintiff at the sum of \$2 for each light so used, making total damages \$10.

I, therefore, give judgment for the plaintiffs for the sum of \$10 damages and for the injunction as prayed, and, following the judgment of the Exchequer Court of the 24th January, 1898, for delivery to the plaintiffs of the infringing mantles, lights and incandescent devices and attachments in question in this suit as are now in the possession of the defendant.

Judgment to be entered for the plaintiffs accordingly with County Court costs of suit.

If the plaintiffs so desire, I order and direct that interim injunctions issue in all the other actions, set out in the order, in this and such other cases, by His Honour Judge McDougall, and bearing date the 12th May, 1898, restraining the defendants in such actions as prayed for in the statement of claim in the said actions.

From this judgment the defendant appealed, and the **Statement.** appeal was argued on May 5th, 1899, before a Divisional Court composed of BOYD, C., FERGUSON, and ROBERTSON, JJ.

Cassels, Q.C., and *DuVernet*, for the appeal. [BOYD, C. —Are we not bound by the decisions already given?] *Cassels*.—Notwithstanding them, this Court is a final Court of Appeal from the County Court, where the plaintiffs have a judgment, and the appeal should be heard. The judgments given merely follow the Exchequer Court case, but this one is different, as the defendant here is a mere purchaser. The plaintiffs' is a process patent. If a patentee takes a patent for a process, but not for the product, he may follow the manufacturer, but not the purchaser. Besides, there was no evidence that what the defendant purchased was manufactured by the plaintiffs' process. The first patent here was for the product, and no reissue for the process could be had: *per* Proudfoot, J., in *Withrow v. Malcolm* (1882), 6 O. R. 12, but rather a new patent; and Mr. Justice Burbidge, in *Auer Incandescent Gas Light Co. v. O'Brien*, disregarded the old cases when he held that there was no power in the Court to question a reissue. The plaintiffs have proceeded against the sellers, who wrongfully imported the infringing mantles into Canada, and have elected to take an account of profits instead of damages, thereby making the sellers agents to sell: *Vidi v. Smith* (1854), 3 E. & B. 969; *Bonathon v. Bowmanville Furniture Manufacturing Co.* (1870), 5 P. R. 195; *De Vitre v. Betts* (1873), L. R. 6 H. L. 319; *Neilson v. Betts* (1870), L. R. 5 H. L. 1; *Smith v. Goldie* (1882), *Cassels' S. C. R. Dig.*, pp. 609, 610, 689-92; 9 S. C. R. 46. The brass fittings were the property of the defendant, and the Judge below erred in ordering them to be delivered up to be destroyed. The defendant could purchase the mantles from the plaintiffs and put them on his own fittings: *The Auer Incandescent Light Manufacturing Co. v. O'Brien* (1897), 5 Ex. C. R. 243; *The*

Argument. *Incandescent Gas Light Co., Limited v. The Sunlight* (1896), 13 Rep. Pat. Cas. 333. I refer also to *Elmslie v. Boursier*, L. R. 9 Eq. 217; *Wright v. Hitchcock*, L. R. 5 Exch., at p. 46; *Von Heyden v. Neustadt* (1880), 14 Ch. D. 230; *Durand v. Schultz* (1894), 61 Fed. R. 819; *Sykes v. Howarth* (1879), 12 Ch. D. 826.

DuVernet, referred to *Stevens v. Grout* (1894), 16 P. R. 210; *McDermott v. Grout* (1894), 16 P. R. 215; *Palmer v. Wagstaff* (1854), 9 Exch. 494; Frost's Law of Patents, 2nd ed., 580, 581, and cases there cited; *Betts v. Willmott* (1871), L. R. 6 Ch. 239; *Merrill v. Yeomans* (1874), 1 Banning & Arden's Pat. Cases (U. S. Cir. Ct.) 47; *Burns v. Meyer* (1879), 100 U. S. R. 671; *The Auer Incandescent Light Manufacturing Co., Limited v. Dreschell* (1898), 6 Ex. C. R. 55.

Aylesworth, Q.C., and Hilton, contra. The reissue was to correct an error in the patented process. All the judgments, Exchequer Court, High Court and Court of Appeal, so far given, are in the plaintiffs' favour, and the trial Judge's judgment on the evidence in this action is also in plaintiffs' favour. The patent has been passed upon and found valid by the Exchequer Court (1897), 5 Ex. C. R. 243, and the plaintiffs are entitled to both the process and the product. *Elmslie v. Boursier* (1869), L. R. 9 Eq. 217, and *Wright v. Hitchcock* (1870), L. R. 5 Exch. 37, are both in plaintiffs' favour, and they are entitled to protection against vending and using as well: *Von Heyden v. Neustadt* (1880), 14 Ch. D. 230. The brass fixtures were used in producing the light and were properly ordered to be delivered up to be destroyed, but the chimneys were not interfered with. The fittings contributed to the infringement and were purchased as part of the apparatus with the intent to infringe: 12 Harvard's Law Review, p. 35. The Supreme Court, in the *Dreschell Case*, affirmed the Exchequer Court judgment as to the delivery up of the frames. *The Edison Bell Phonograph Corporation, Limited v. Smith* (1894), 11 Rep. Pat. Cas. 389; *Neilson v. Betts*, and *De Vitre v. Betts*, only decided that

profits and damages, that is two damages, could not be had against the same vendor. All purchasers may be followed: *Penn v. Bibby* (1866), L. R. 3 Eq. 308, at p. 311. See also *Plimpton v. Spiller* (1876), 4 Ch. D. 286, at p. 292; Frost's Law of Patents, 1st ed. 424, 2nd ed. 598; *The United Telephone Co. v. Walker* (1886), 4 Rep. Pat. Cas., at p. 67; *Boyd v. Tootal Broadhurst Lee Co., Limited* (1894), 11 Rep. Pat. Cas. 175, at p. 179. Argument.

Hilton, referred to *Edison & Swan Electric Light Co. v. Holland* (1888), 5 Rep. Pat. Cas. 459; Frost, 2nd ed., 611.

Cassels, in reply, cited *Hinks v. Safety Lighting Co.* (1876), 4 Ch. D., at p. 613; *Railroad Co. v. Mellon* (1881), 104 U. S. R., at p. 118; *Watson v. Holliday* (1882), 20 Ch. D., at p. 784.

June 21st, 1899. BOYD, C.:—

This is a patent in which it is found by the judgment of the Exchequer Court that the process described in manufacturing the illuminant appliance was new and useful and also that the result or product of that process was new and useful.

In the later form of the patent, it is argued that only the process is protected, and that a person using the product (of this process) imported from abroad is not invading the monopoly granted by the patent.

The patent of 1894 gives to the plaintiffs the exclusive right for fifteen years of making, constructing, using and selling to others, to be used, the said invention as described in the specifications annexed. These set forth fully the method of manufacture and make claim to the method described of making incandescent devices.

Now, according to English law, such a patent protects not only the process but the thing produced by that process.

In *Von Heyden v. Neustadt* (1880), 14 Ch. D. 230, James, L. J., said (adopting the conclusion arrived at in *Elmalie v. Boursier* (1869), L. R. 9 Eq. 217): "That the

Judgment. sole right * * to 'make, use * * and vend the
 Boyd, C. invention' * * includes a monopoly of the sale * *
 of products made according to the patented process. * *
 A person who * * sells the product here, is surely
 indirectly making, using, and putting in practice the
 patented invention. Any other construction," he adds,
 "would render * * the whole privilege * * futile,"
 p. 233.

To the same effect, Martin, B., in *Wright v. Hitchcock* (1870), L. R. 5 Exch., at p. 48, says: "The invention being patented, then, according to the patent law as constantly administered, the patent protected not merely the machinery, but the articles manufactured by it." And that was a case, where the patent was not for the manufactured product, but for the process of manufacturing it.

Having regard to the fact that the mantles used were manufactured in the States and brought over for sale here, there was, I think, sufficient evidence given that they were made according to the plaintiffs' process, to throw the onus on the defendant of shewing the contrary: *Neilson v. Betts* (1870), L. R. 5 H. L. 1.

I see no reason to hold that an action does not lie against any person purchasing and using mantles made in derogation of the plaintiffs' patent no matter where they come from. Such was the case in *Moser v. Marsden*, [1892] 1 Ch. 487.

Nor is there any ground of defence in the fact that the persons importing have been proceeded against and an agreed nominal sum for damages recovered against them. The practice is well settled that though the plaintiff cannot have both an account of profits and also damages against the same defendant, yet he may have both remedies as against different persons (*e.g.*, maker and purchaser) in respect of the same article: *Lawson's Patents, Designs and Trademarks*, 3rd ed., p. 305.

And the leading authority is *Penn v. Bibby*, and *Penn v. Jack* (1866), reported together in L. R. 3 Eq. 308. One suit there was against the manufacturer and against him

there was decreed an account for profits; and in the other suit the recovery was against a purchaser and damages awarded for the illegal use. The keeping of the account pending the action against the importers did not operate as a license to justify the sale of the mantles; but was only an expedient to preserve the rights of all parties to the close of the litigation as pointed out in *Plimpton v. Spiller* (1876), 4 Ch. D. 286, at p. 292.

Judgment.
Boyd, C.

Another case very much in point on this head is *The United Telephone Co. v. Walker* (1886), 4 Rep. Pat. Cas. 63, at p. 67, where, as against the manufacturer, the patentees recovered an agreed sum for damages with a stipulation that the names of purchasers should be disclosed: it was held, as against the purchasers, that they were not exonerated from liability. There was a reservation of rights here more explicitly against the users in the former recovery against the infringing company.

The judgment in appeal went too far in being levelled against the brass support used in connection with the mantles. This, purchased by the defendant, is his property and that thing *per se* is not in contravention of the plaintiffs' patent: *Townsend v. Haworth* (1875), 12 Ch. D., at p. 831, in note to *Sykes v. Howarth* (1879), and same case 48 L. J. Ch. N. S. 770.

Though this is the final Court of Appeal in this litigation, still I think it is our duty to defer to the various cases, which affirm the validity of the patent and to follow the example of the Court of Appeal in the unreported case of *Welsbach Co. v. Stannard*, in which the Court refused to disturb the decision in the *O'Brien* case (1897), 5 Ex. C. R. 243.

I quite concur in the conclusions of the learned Judge of that Court as to the original patent and the reissue, namely, that both covered the same invention and both operated to protect the same thing under a different claim.

In the one case the first patent protected the product as derived from the specified process; the later reissued patent

Judgment. protected the process as applied to the manufacture of this
Boyd, C. product.

As to the American cases there is distinct cleavage in the decisions before and after the Patent Act of 1870.

The effect of that legislation is explained in *Durand v. Green* (1894), 60 Fed. R. 392. The earlier law of 1836 was very much the same as the Dominion Patent Act. The Act of 1870 provided for the specifications, and claim as two distinct things and requires an inventor not merely to specify and point out but to "particularly point out and distinctly claim" his invention.

By the earlier Act he was instructed to specify what he alleged to be his invention: by the later Act, he is told the invention for which he seeks a patent he must distinctly claim. Under the old law, the all important thing is the scope of the invention, but under the stricter modern rule (necessitated by the competition of inventors and the developments of modern science) the matter for determination is the subject matter of the patent, as defined and limited by the claim.

This restrictive policy does not obtain in England nor has it been adopted in Canada. We stand on the old footing and the earlier decisions in the States are in conformity with the English cases: *Vickers v. Siddell* (1890), 15 App. Cas. 496.

Thus the *Goodyear* case, Fisher's Patent Cases 626, lays down the law applicable to the present patent: where the product and the process constitute one discovery the monopoly of both is secured to the inventor. Or as excellently put by Dallas, J., in *Durand v. Green*: "He who conceives a new method, and by that method produces a new substance, invents, * * both a process and a product. * * The manner of producing and the thing produced, may, of course, be separately contemplated, but the inventive act from which both are derived is not divisible," p. 392.

In the plaintiffs' patents, therefore, which cover the whole invention; the first expressly claimed the product,

but the process was constructively included: while in the reissued patent the process was expressly claimed but the product was constructively included.

Judgment.
Boyd, C.

I do not propose to dwell on any technical points that may arise on the reissue; for I am content to adopt the judgment of Mr. Justice Burbidge on this appeal.

The judgment should be affirmed with costs, with a variation, excepting the brass fittings or gallery from the condemnation of the judgment.

FERGUSON and ROBERTSON, JJ., concurred.

G. A. B.

[DIVISIONAL COURT.]

THE NIAGARA FALLS PARK AND RIVER RAILWAY CO.

V.

THE MUNICIPALITY OF THE TOWN OF NIAGARA.

Assessment and Taxes—Railway Company—Right of Way—License to Use—Assessment of—Possession—55 Vict. ch. 96 (O.).

The plaintiffs had a license to use and were using a right of way through the Queen Victoria Niagara Falls Park for their electric railway, under an agreement confirmed by 55 Vict. ch. 96 (O.):—

Held, that there was an actual, visible, continuous and exclusive possession of the roadway for the profitable use and operation of the railway for a term, and that the company was liable to taxation for the roadbed as an occupant is assessed in respect of property; but the property itself, being in the Crown or held by the public, was exempt.

Judgment of the County Court of York reversed.

THIS was an appeal from the County Court of the county of York. Statement.

The action was brought by the railway company against the town of Niagara to recover back taxes assessed and paid under protest, on their right of way through the Queen Victoria Niagara Falls Park and a part of the town, the whole right of way being on the chain reserve vested in the Crown, referred to in *The Commissioners, etc. v. Howard* (1892), 23 O. R. 1.

The facts sufficiently appear in the judgments in the Divisional Court.

Statement.

The action was tried before His Honour Judge Morgan, Junior Judge of the county of York, without a jury, on December 21st, 1898.

H. S. Osler, for the plaintiffs.

C. A. Masten and *Alex. Fraser*, for the defendants.

February 23, 1899. MORGAN, Co. J.:—

To support the assessment upon which the taxes in question were levied, the plaintiffs would have to be brought within the operation of sub-sec. 2 of sec. 7, R. S. O. ch. 224 (the Assessment Act).

I am of the opinion that the plaintiffs were not and are not within the meaning of that sub-section occupants of the land for which they were assessed, nor was the land occupied by them in the sense contemplated by the sub-section.

I am, therefore, of opinion that there was no jurisdiction to make the assessment.

I give judgment for the plaintiffs for \$124.42 with interest from the 21st July, 1898,* and with costs of suit.

From this judgment the defendants appealed, and the appeal was argued on May 3rd, 1899, before a Divisional Court composed of BOYD, C., FERGUSON, and ROBERTSON, JJ.

C. A. Masten, for the appeal. All property is liable to taxation, R. S. O. ch. 224, sec. 7, except the exemptions mentioned in the sub-sections. The plaintiffs were properly assessed under sub-section 2 and are liable as occupants, although the property itself may not be. The plaintiffs have the exclusive right in some particulars and the superior right in others over the whole way: 55 Vict. ch. 96 (O.). *The Toronto Street R. W. Co. v. Fleming* (1875), 37 U. C. R. 116, might once have supported the plaintiffs'

*The amount paid under protest and the date it was paid.—REP.

contention, but that decision has been overruled: *In re Toronto R. W. Co. Assessment* (1898), 25 A. R. 135. Subsec. 2 of sec. 7 of the Assessment Act, R. S. O. ch. 224, brings the occupancy of Crown Lands in line with the English cases where the occupants are assessable, but the property is not itself liable. I refer to *The Pimlico, etc., Tramway Co. v. The Assessment Committee of the Greenwich Union* (1873), L. R. 9 Q. B. 9; *The Assessment Committee of Holywell Union v. Halkyn District, etc., Co.* (1894), 11 Times L. R. 132; Boyle & Davies' Law of Rating, 2nd ed., p. 76.

H. S. Osler, contra. The "right of way" of an ordinary railway is the fee in the roadway. Here it is merely the occupation of land. The park was established by 50 Vict. ch. 13 (O.). The land is vested in commissioners. The commissioners are a public body to manage the park for the public: they have not parted with any of their property, but merely granted a license to use a portion of it, which portion is not even fenced in. The location of the railway in the park and chain reserve must be where the commissioners decide, which is inconsistent with any lease or real possession: Clause 4 of the agreement, 55 Vict. ch. 96 (O.). The rental payable is for a "right of way over," not for any property leased or granted. The railroad is a public road. I refer to *In re Toronto R. W. Co. Assessment*, per Osler, J.A., at pp. 138, 139, 140; and the cases collected in *The Consumers' Gas Co. of Toronto v. The Corporation of the City of Toronto* (1895), 23 O. R. 722.

Masten, in reply. This land is not occupied in any official manner, but for private gain. See also *Great Western R. W. Co. v. Rouse* (1857), 15 U. C. R. 168.

June 20, 1899. BOYD, C.:—

By 50 Vict. ch. 13, sec. 3 (O.), the Queen Victoria Niagara Falls Park through which the road of the plaintiff runs is vested in commissioners as trustees for the Province of

Judgment. Ontario. And by section 10 the grounds are open to the public, subject to such rules as may be made for the management and regulation of the park.
Boyd, C.

By 55 Vict. ch. 96 (O.), the plaintiffs have power to construct and operate an electric railway through the park upon a location to be designated and upon terms of payment as specified in the agreement of 4th December, 1891, confirmed by that statute.

The railroad goes through the park not upon any public street or other road but forming a way for itself which is not travelled by the public on foot, horse or vehicle. Having right of access to the park, the public can cross and re-cross the track at pleasure, but not so as to interfere with it. The soil under and along the right of way is occupied exclusively by the ties, rails and ballast of the railway with which no one can lawfully intermeddle and in regard to which the plaintiffs have a practical monopoly.

If a tramway along a public street is taxable, *a fortiori* must this railroad through the park be assessable under the provisions of the Act, R. S. O. ch. 224.

The ground of exemption claimed by the plaintiffs on the record is, that the railway is a public road under sub-sec. 6 of sec. 7 of the Assessment Act, R. S. O. ch. 224; but the real question arises (where it is placed by the County Judge) whether it is exempt under sub-sec. 2 of sec. 7.

He holds that it is exempt because the company are not occupants of the lands for which they were assessed within the meaning of that sub-section.

But it appears to me that his conclusion cannot be sustained.

It was agreed upon the argument, that the land area occupied was assessed and not the superstructure—except upon the question of value this distinction is perhaps not very material in this assessment.

In the ordinary railroad, when the right to expropriate land has been exercised, the superstructure is not assessable, but only the land “occupied by the road.” And it

is not permitted to add the value of the fixtures to the land value: R. S. O. ch. 224, sec. 31. But apart from this statute or special contract, the rails, etc., are affixed to the land and as such liable to assessment as giving additional value to the freehold: see *per* Strong, C. J., in *The Consumers' Gas Company of Toronto v. The City of Toronto* (1897), 27 S. C. R., at p. 458, and *Great Western R. W. Co. v. Melksham Union* (1870), 34 J. P. 692.

Judgment.
Boyd, C.

We are not concerned now as to whether the original assessment as confirmed by the Judge was on the land occupied by the road as land, or as land enhanced in value by the superstructures; for it is enough, if anything is due upon the entire assessment in such an action as this.

That the occupation of highways by the rails and road-bed of a tramway is ratable is established by *The Pimlico, etc., Tramway Co. v. The Assessment Committee of the Greenwich Union* (1873), L. R. 9 Q. B. 9, a case recognized by the House of Lords in *The Assessment Committee of the Holywell Union v. The Halkyn District, etc., Co.* [1895], A. C. 117; it is there decided that the rails occupy a portion of the soil, and are exclusively used for the purposes of the tramway, whereby the company became occupiers of that portion of the soil. They are not the less occupiers says Mr. Justice Lush, because the public still have the right of passing over the surface of their iron road: at p. 15.

The 7th section of the Assessment Act (then the 9th of the Act of 1869) was much discussed in *The Toronto Street R. W. Co. v. Fleming* (1874), 35 U. C. R. 264, the decision in which is now to be treated as re-established by the Supreme Court: *In re Toronto R. W. Co., Assessment* (1898), 25 A. R. 135.

The very point here involved was passed upon by Richards, C. J., at p. 279. He says, "If the soil and freehold of the land on which the plaintiffs' railway is built be in the Crown, * * that brings it within the first exemption, then if the plaintiffs occupy any portion of it, they can be assessed."

Judgment.
Boyd, C.

Besides this, the *Pimlico Case* is clearly law in this Province, having regard to the section of the Assessment Act now in question; i.e., sec. 7, sub-secs. 1 and 2.

Property vested in any public body or body corporate for the public uses of the Province or for Her Majesty is exempt; but when any such property is occupied by any one otherwise than in an official capacity, the occupant shall be assessed in respect thereof but the property itself shall not be liable.

That puts the incidents of taxable liability as it is in England in the case of poor rates upon the person and not upon the property: *Moore v. Hynes* (1862), 22 U. C. R. 117, per Hagarty, J.

The occupant is assessed in respect of the property: *Regina ex rel Latchford v. Frizell* (1872), 9 U. C. L. J. N. S. 27; the property itself as in the Crown or held by the public is exempt, and cannot be sold to make good the tax.

That was the scope of the liability in the *Pimlico Case*, the poor rate being a personal tax in respect of the occupation of land, which is beneficial and exclusive.

Even applying that very test, to elucidate the meaning of occupation in the case of Crown or public lands, every point is met by their occupation by the electric railway through the park. There is the actual, visible, continuous and exclusive possession of the roadway for the profitable use and operation of the railway for a term of forty years. I am not much concerned as to the nature of the license secured or manifested in the agreement between the company and the commissioners, which is ratified by the statute.

But I think it is very much more than an *easement* or *license* and is in truth a letting of the right of way at a yearly rental for a period of forty years: see secs. 1, 4, 6, 8, 13, 16, 19, 29, 32, of the agreement; schedule B. 55 Vict. ch. 96 (O.).

The words "license and permit" at the beginning are sufficient for a demise; thus in the Touchstone, § 272 "If

A. license B. to enjoy such a piece of land for twenty years, this is a good lease ;" and see *Doe d. Parsley v. Day* (1842), 2 Q. B., at p. 152 ; *Taylor v. Pendleton*, 19 Q. B. D. 288. And to enjoy a right of way in railway parlance is equivalent to an enjoyment of the strip of land itself, and not mere right of passage over or along it : *New Mexico v. The United States Trust Co.* (1898), 172 U. S. Rep., at p. 182.

Judgment.
Boyd, C.

Nevertheless, if the arrangement does not amount to a license, yet thereunder the land is so occupied as to satisfy what is required to give an assessable interest within the section in hand : see *per* Lord Herschell in *Assessment Committee of Holywell Union v. Halkyn* [1895], A. C., at p. 121 ; *Rex v. Green* (1829), 9 B. & C. 203 ; *The Lancashire, etc., Co. v. The Overseers of Manchester* (1884), 14 Q. B. D., at p. 271 ; *The Queen v. Ponsonby* (1842), 3 Q. B. 14 ; *Rex v. Mathews* (1777), Cald. 1.

A license to use is a liberty to occupy : *Regina v. Stevens* (1865), 12 Law Times Rep. 491. A precarious occupation is quite sufficient.

So far as the track is concerned the company has a monopoly under the agreement. For this the company may be assessed as land in occupation. And the railroad includes I take it, the way on which the cars actually go, including the line itself and land used only for the support of the way in the case of embankments, etc. : *The South Wales R. W. Co. v. The Local Board of Health of the Borough of Swansea* (1854), 4 E. & B. 189.

However, as I said before, we are not now concerned about the quantum ; something is clearly payable and the excess, if any, cannot be investigated except by way of appeal from the assessment : *Crease v. Sawle* (1842), 2 Q. B. 862, approved in *The Overseers of the Poor of Manchester v. Heudlam, etc., R. W. Co.* (1888), 21 Q. B. D. 96.

In every aspect of the case, I think that the assessment, as made in the first instance and confirmed by the Court of Revision and afterwards on appeal by the County Judge of the locality, was right and should not have been disturbed by the County Judge of York in this action.

Judgment.

Boyd, C.

The taxes paid under protest were well paid and should be retained by the municipality and this action dismissed with costs and costs of appeal, to be paid by the railway.

FERGUSON, J.:—

The plaintiffs brought the action to recover back from the defendants the sum of \$124.42 paid by them to the defendants as taxes assessed against the plaintiffs in respect of their railway within the defendant municipality, such assessment being for the year 1897.

As part of their defence the defendants set up that the plaintiffs were estopped by reason of the appeal to the Court of Revision and afterwards to the County Court Judge whose decision was against them. The defendants also set up the payment of the money in such circumstances and in such a manner that it could not be recovered back.

There was before us no argument or contention as to either of these matters of defence, and they may, I think, be treated as defences not relied upon at all.

There is a memorandum of admissions in the case. By the second clause of this, it is admitted that the plaintiffs' railway in the town of Niagara Falls is situated within what is known as the "chain reserve," and that with regard to that chain reserve reference might be had to the fact stated and found by the learned Chancellor in the case, *The Commissioners for the Queen Victoria Niagara Falls Park v. Howard* (1892), 23 O. R. 1; also in *The St. Catharines, etc., Co. v. Gardner* (1871), 21 U. C. C. P. 190; also in *Graham v. Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O. R. 1. The facts stated in these cases were admitted for the purposes of the argument.

It is also proved by the evidence of Mr. Robinson, the clerk of the defendant municipality, that the plaintiffs' road in the municipality is situated wholly within the "chain reserve," and that the road spoken of as the "gravel road" is "always" to the west of it.

In the case *The Commissioners, etc. v. Howard*, above, Judgment.
it was found and determined that this "chain reserve" Ferguson, J.
was "waste lands of the Crown held for public purposes."

This case was affirmed in the Court of Appeal in 1896, 23 A. R. 355. I apprehend it will not be disputed that such lands in the Province became lands of the Province held for the Crown.

By the first sub-section of sec. 3 of 50 Vict. ch. 13 (O.), the lands selected by the commissioners of the Niagara Falls Park, approved of by the Lieutenant-Governor in Council and contained in the map as defined or described in the section, with certain exceptions afterwards mentioned in the Act, became vested in the commissioners (who were by the second section of the Act created a corporation) as trustees for the Province.

The lands in question here were lands so selected and approved, and are not within the exceptions mentioned in the Act.

Through these commissioners by an agreement, validated by 55 Vict. ch. 96 (O.) (An Act incorporating the plaintiff company), the plaintiffs derive their rights in respect of the lands upon which the superstructure of their railway as used by them rests and is.

By the first clause of that agreement the commissioners "license and permit" the plaintiffs to construct their railway (a first-class electric railway with single or double tracks as might thereafter be agreed upon).

For the "right of way" over the "chain reserve," as defined in the eighth paragraph of the contract, the plaintiffs were to pay the commissioners the sum of \$10,000.

The nineteenth paragraph or clause of the agreement provided that, in addition to all other payments to be made by the plaintiffs to the commissioners, for "right of way" and other privileges referred to, the plaintiffs should pay to the commissioners the clear annual sum of \$10,000 by way of rental for each and every year until the termination of the period or term of forty years, with the option to the plaintiffs of having a second period or term

Judgment. and paying a rental to be agreed upon or fixed by arbitration.
Ferguson, J.

The plaintiffs then took by the agreement a license and permission to construct the railway, and they agreed to pay a rental of \$10,000 a year for the term of forty years, which by itself would indicate a tenancy.

The twenty-ninth clause of the agreement provided that subject to the terms and conditions of the agreement and to the rights of the commissioners as owners in fee simple of the right of way in the park proper and on the "chain reserve," the railway and their equipment and the other works constructed or acquired under the agreement should upon such construction or acquisition, as the case might be, be vested in and be the property of the plaintiffs, and that the plaintiffs should be entitled to operate, manage and control the same during the period or periods mentioned in the agreement, but that at the end of the first or second periods, as the case might be, the railway and equipments (to put it shortly) should become the property of the commissioners, subject to the payment of compensation.

This seems to be an outline in brief of the rights that are material here that were derived by the plaintiffs through the commissioners.

In these circumstances (which are perhaps not sufficiently or too vaguely stated), the plaintiffs went on and constructed their road and the equipments; and there is no room for doubt that it is a first-class electric road, as contemplated in and provided for by the agreement, and they have since hitherto used and operated it and enjoyed the benefits arising therefrom.

There was much said on the argument as to the manner in which the railway is laid. From all that appears, all I am disposed to say as to this is that in the defendant municipality the road is upon the "chain reserve" and is laid, so far as I can see, just as other roads are laid, the ordinary ties being used, the rails upon them and duly fastened, and then it is ballasted in the usual way; sod-

ding being employed in the park proper for appearance Judgment.
 sake, the road not in any place being upon the road called Ferguson, J.
 the "gravel road" or any part of the same, the necessary
 poles to hold the wires being part of the way in the centre
 line between the tracks and part of the way on either side
 of the road.

A very large number of cases and authorities were cited, particularly with regard to the meaning of the word "occupied" as used in sub-secs. 1 and 2 of sec. 7 of the Consolidated Assessment Act of 1892.

The arguments were forcible and clear and in some parts were characterized by what I may call unusual energy.

I have perused with care all the authorities which were referred to, and I have arrived at the opinion and conclusion that the plaintiffs were and are occupants of the land on which their railway is laid.

In the case *The Toronto Street R. W. Co. v. Fleming* (1875), 37 U. C. R., at p. 127, Mr. Justice Patterson said: "The plaintiffs in this case are doubtless occupiers of land," referring to the *Pimlico, etc., Tramway Co. Case* (1873), L. R. 9 Q. B. 9. See also the remarks of Mr. Justice Burton at the foot of page 122. This case is now said to have been overruled; but that is indifferent as to the use I am seeking to make of these expressions, and the opinion I have imbibed from a perusal of the English cases accords with this view.

I am of the opinion that the land on which this railway is laid is properly vested in Her Majesty within the meaning of sub-sec. 1 of sec. 7 of the Act, R. S. O. ch. 224; that it is not unoccupied, but was and is occupied by the plaintiffs, within the meaning of sub-sec. 2 of the same seventh section, and there is no portion that the plaintiffs occupy in any official character.

I am, therefore, of the opinion that the plaintiffs were properly assessed in respect of this land, but the land itself is not liable for the assessment (the taxes). With the amount of the assessment, I think we have no concern.

Judgment. From this it follows that this action cannot be maintained and that it should be dismissed and with costs as well as the costs of this appeal.

Ferguson, J.

ROBERTSON, J. :—

I concur in the judgment of the Chancellor.

G. A. B.

[DIVISIONAL COURT.]

THE GARLAND MANUFACTURING CO.

v.

THE NORTHUMBERLAND PAPER AND ELECTRIC CO. LIMITED.

Company—Landlord and Tenant—Verbal Agreement—Yearly Tenancy—Holding Over—Want of Corporate Seal—Executory Contract—Use and Occupation.

There is a broad and well marked distinction between contracts executed and contracts executory in the case of incorporated companies whether trading or not, and where a contract is executory a company is not bound unless the contract is made in pursuance of its charter or is under its corporate seal.

The defendant company who had occupied certain premises under a verbal agreement and paid rent for a year continued in possession after the year and then went out paying rent for the time they were actually in possession :—

Held, that as there was no lease under seal the company were not liable as tenants from year to year but only for use and occupation while actually in possession.

Finlay v. The Bristol and Exeter R. W. Co. (1852), 7 Ex. 409, discussed and followed.

Judgment of the County Court of the county of York reversed.

Statement. THIS was an appeal from the County Court of the county of York in an action for rent which was tried before His Honour Judge Morgan, a junior Judge of the county, on the 18th, 19th and 20th days of January, 1899, without a jury.

The facts sufficiently appear in the judgments in the Divisional Court.

S. C. Smoke, for the plaintiffs.

Statement.

Thomson, Q.C., and *W. H. Irving*, for the defendants.

The trial Judge gave judgment for the plaintiffs for \$186.67, the amount claimed.

From this judgment the defendants appealed, and the appeal was argued on May 4th, 1899, before a Divisional Court composed of BOYD, C., FERGUSON, and ROBERTSON, JJ.

Thomson, Q.C., for the appeal. The evidence shews there was no document under seal between the parties; in fact, nothing in writing. Any arrangement made was made by the president of the defendant company, who was so interested in the plaintiffs' business as almost to be the proprietor: *Beatty v. North Western Transportation Co.* (1885), 11 A. R., *per* Burton, J. A., at p. 214. The defendant company's board of directors were so interested at the end of the first year, that they could not have made a contract binding on the company, and the law will not imply one, except, perhaps, to pay for actual use and occupation. The premises were jointly occupied and the defendant company had no lease, but a mere license to use an uncertain part of the premises, with the privileges of light, heat, telephone, typewriter, mercantile agency and porter: *Smith v. The Overseers of St. Michael, Cambridge* (1860), 3 El. & El. 383. There must be control over a definite area of space in order to constitute a lease: *The Queen v. St. George's Union* (1871), L. R. 7 Q. B., at p. 97; *The Municipal Freehold Land Co. v. The Metropolitan and District Railways Joint Committee* (1883), Ca. & El. 184; *The London and North Western R. W. Co. v. Buckmaster* (1875), L. R. 10 Q. B. 444; *Hancock v. Austin* (1863), 14 C. B. N. S. 634; *Redman & Lyon's Law of Landlord & Tenant*, 4th ed. 69; *Foa's Landlord & Tenant*, 2nd ed. 7. There was no contract under seal: *Finlay v. The Bristol and Exeter R. W. Co.* (1852), 7 Exch. 409, has

Argument. always been followed in England. Pollock on Contracts, 6th ed. 146, 153, says the *Finlay* case is probably overruled, but Addison's Law of Contracts, 9th ed. 349, 350, takes the opposite view; and subsequent text writers agree with Addison: Woodfall's Landlord & Tenant, 16th ed. 580; Foa's Law of Landlord & Tenant, 2nd ed. 59; Brice's Doctrine of Ultra Vires, 3rd ed. 549. The dictum of Meredith, C. J., in *Bain v. Anderson* (1896), 17 O. R., at p. 373, is not justified, for while the rule that a company can only bind itself by its corporate seal has in some matters been broadened, it has not been changed in regard to transfers of interests in land.

Watson, Q. C., contra. The first question is one of fact: was there a lease to the defendant company for one year, and the second, if there was, did their remaining on after the expiry of that year constitute a tenancy from year to year? The first has been found by the trial Judge on the evidence in favour of the plaintiffs. The defendants were a trading company, with a head office in Toronto and meetings of directors were held there. The evidence and resolutions shew the leasing of the premises, the agreement to pay the rent, and that the proper parties made the arrangement. It was a lease for less than three years and for the usual purposes of their business, and did not require to be under seal: R. S. O. ch. 191, sec. 81. If the *Finlay* case is law, no company could become a yearly tenant by holding over; but the law has changed since that judgment was delivered in 1852, and there was no such statutory provision then as there is here now. The company can bind itself in the statutory mode: *per* Baron Parke in the *Finlay* case, at p. 415. *The South of Ireland Colliery Co. v. Waddle* (1868), L. R. 3 C. P. 463, was really a reversal of the *Finlay* case, and it was there held that if the contract was for a purpose connected with the objects of the incorporation, or was warranted by the articles of association, a seal was not necessary: *S. C.*, affirmed (1869), 4 L. R. C. P. 617, *per* Cockburn, C. J., at p. 618; Pollock on Contracts, 5th ed. 147; *Bain v. Anderson* (1896), *per*

Meredith, C.J., at pp. 372 and 373; *Allen v. Ontario and Rainy River R. W. Co.* (1898), *per* ROSE, J., at p. 516. A director may lease to a company of which he is a director, unless he has a conflicting interest; and *Beatty v. North Western Transportation Co.* (1885), 11 A. R. 205, does not apply. The law should presume a lease here rather than a license.

Thomson, in reply.

June 20, 1899. BOYD, C.:—

Having read and considered all the evidence and the pleadings, I am very clearly of opinion that if this was a case of specific performance by either company with a view to establish the terms of a lease to be executed it would be simply impossible for the Court to interfere, owing to the uncertain evidence as to many essential terms of the alleged contract. As Romer, J., once remarked there are probably some pieces of truth but it is difficult to say what the truth is in this mosaic.

First, the claim that the defendants' tenure of the premises was to be contemporaneous with the duration of the lease obtained by the plaintiffs of the Bay street property (which is also affirmed under oath on examination for discovery by the plaintiff company in the person of the sole proprietor, N. L. Garland) is abandoned after being negatived in the testimony of Garland senior, a negative which is rather incongruously echoed by his son when examined at the hearing.

The ultimate attitude now is on the part of the plaintiffs that the tenancy was only for the year beginning 1st October, 1896; but even this is contested by the defendants.

Next it is not possible to reconcile the evidence as to whether the rent was to be \$400 or \$360. The chief and active managing men of the defendant company, Matchett and Mulholland, stand for the lesser sum. Garland and his son swear to the larger with slight corroboration on the part of LeVesconte.

Judgment.

Boyd, C.

But a very material factor giving great weight to the defendants' contention, is that Garland senior agreed to the reduction of the \$40 and said he would pay it himself and also admitted to Mulholland that the charge of \$400 was wrong when he was remonstrated with by Matchett on the overcharge.

And again there is a lack of certainty about what was the subject of demise without referring to contentions as to the use of the typewriter, Bradstreet and porter. Take the item of cellar space. A material part of the premises demised is attributable to this space for storing the defendant's paper.

Yet on the undisputed evidence there was not any definite ascertainment of what space should be given or how the cellarage should be divided between them. The plaintiff says in his examination for discovery as to the bargain "they were to have an office and room for their paper," "it would be almost impossible to define the space in which the paper was because we always had to have a way right through it to the hoist and when our goods came in they would be left from the hoist immediately surrounding it."

The father says Matchett "put off, I suppose it would be thirty or forty feet in length (in rear of basement) and he said he thought they would require that much of it (part next the hoist). * * I said there is plenty of room here for both of you." Matchett says "There was no special understanding as to what part of the cellar we should have, we were to have room to put in the paper."

However the use of the storage room might have been adjusted in practice—that grew out of friendly arrangements and not in pursuance of any contract. And even as it was, the goods and paper of the two occupants were frequently mixed up in the cellar.

Even if there was certainty and sole occupation as to the inner office (though this is disputed) there was none as to the basement. If as to the room there was at the outset a sufficient demise there was nothing higher than a

license as to the cellar and what was payable for each cannot be apportioned out of the entire sum payable.

Judgment.
Boyd, C.

I find it difficult to say that there was any lease of the property or any contract binding on the defendant company to pay for what they used; though doubtless, they are liable for use and occupation for so much and so long as they enjoyed it.

There was no action as to this property under the directors' resolutions of the 8th November, 1895, or 13th January, 1896. The only other authority given by the company is to be found in the resolution of 15th June, 1896, and in these words of the motion which was carried, that "a warehouse be at once procured in the city of Toronto to be in charge of J. Matchett." No committee was appointed to carry this out, but the president, N. Garland and Matchett, assumed to act in the matter and appeared to have negotiated all that happened in reference to the premises in question. What they did was not reported to the corporation, and there is absolutely nothing to shew that the defendants as a corporate body knew of or sanctioned any such lease as is set up in the pleadings and evidence for the plaintiff.

The explanation probably is that the defendants were much in the control of the president who was also negotiating for Bay street premises in the interest of his son, the plaintiff, and so the whole was left at loose ends.

But to such a contract as this for the leasing of business premises the language of Martin, B., is still applicable as found in *Williams v. The Chester and Holyhead R. W. Co.* (1851), 15 Jur. 828: "Persons dealing with these companies should always bear in mind that such companies are a corporation, a body essentially different from an ordinary partnership or firm, for all purposes of contracts, and especially in respect of evidence against them on legal trials; and should insist upon these contracts being by deed under the seal of the company, or signed by the directors in the manner prescribed by the Act of Parliament. There is no safety or security for any one dealing with such a body upon any other footing": at p. 830.

Judgment.

Boyd, C.

Here there was no contract made in writing and no authority delegated to make any contract under the 46th and 81st sections respectively of the Ontario Companies Act, R. S. O. ch. 191, which applies to these defendants. And the evidence as to what was the contract (in consequence of the neglect of these provisions) is so uncertain and unsatisfactory that no Court would be justified in acting upon it as to matters executory.

According to the law which binds us there is still a broad and well marked distinction between contracts executed and contracts executory in the case of a corporation whether trading or other. The intimation to the contrary which is found in Pollock on Contracts, 5th ed., p. 149, is not accepted by our Courts.

See the discussion of authorities by Blake, C., in *Pim v. The Municipal Council of Ontario* (1860), 9 C. P. 304, a passage which is adopted as law by Patterson, J., in *Bernardin v. The Municipality of North Dufferin* (1891), 19 S. C. R., at p. 636.

A case of great interest on this head decided in 1864, is *Wingate v. Enniskillen Oil Refining Co.*, 14 C. P. 379, where the judgment of Richards, C. J., is of great weight as to the policy of relaxing the old rules in the case of executory engagements.

An oil refining corporation had there entered into a contract, not under seal, for the purchase of a quantity of barrels, but it was held by the full Court that because the contract was executory and not under seal, no liability arose: see to the same effect *per* Lord C. J. Campbell, *Lowe v. The London & North Western R. W. Co.* (1852), 18 Q. B., at p. 637, and *Doe d. Pennington v. Taniere* (1848), 12 Q. B. 998, which last is cited in *The Hamilton and Port Dover R. W. Co. v. The Gore Bank* (1873), 20 Gr., at p. 197.

I think it may be safely said that when the contract is executory a corporation cannot be held bound by the Court unless that contract is made in pursuance of its charter or is under the corporate seal.

As to the general observations as to the power of cor-

porations to contract without seal made in *The South of Ireland Colliery Co. v. Waddle* (1868), L. R. 3 C. P. 463, and (1869), 4 C. P. 617, I would infer that they do not receive the concurrence of other Judges who expressed themselves generally in *Hunt v. The Wimbledon Local Board* (1878), 4 C. P. D. 48.

The *South of Ireland* case does not seem to touch the decision in *Finlay v. The Bristol and Exeter R. W. Co.* (1852), 7 Exch. 409, which, if law, concludes the appeal adversely to the plaintiffs. Alderson, B., there said that "It cannot be contended that the occupation of premises for a year is either a matter of daily occurrence or of so trivial a character as to require the dispensation with the corporate seal": at p. 411. The decision was that a company was not liable to pay for premises as for use and occupation when they did not occupy and had not contracted to occupy in any valid way.

It is suggested in Sir F. Pollock's book, 6th ed., p. 146, that *Finlay v. Bristol* has probably been overruled and that result is favoured by Sir W. Meredith's observations in *Buin v. Anderson* (1896), 27 O. R., at p. 373. That case was itself reversed in appeal (1897), 24 A. R. 296, and (1898), 28 S. C. R. 481, though this particular view may not have been touched.

But other text writers do not so regard the case. In the last edition of Leake on Contracts, 1892, p. 515, *Finlay v. Bristol*, is cited for the proposition that a corporation cannot be charged for constructive occupation under a implied tenancy from year to year founded on the payment of rent. So in Chitty on Contracts, 13th ed., p. 293, and in Taylor on Evidence, 9th ed. (1895), p. 643, and in Woodfall, 16th ed., p. 580.

In Bazalgette and Humphreys' Local Government, p. 139, it is cited for this, that the occupation of land or the payment of rent by a corporation, does not operate as evidence of a demise as in the case of an individual. Pollock is referred to but without approval, p. 138.

So in the Encyclopædia of the Laws of England, vol. 7,

Judgment.
Boyd, C.

Judgment.

Boyd, C.

pp. 241, 242. Corporations aggregate may be sued in respect of premises occupied by them for corporate purposes, though only, as it seems, for the period of actual occupation citing the case in 7th Exch. The article is by Foa and Hindmarsh, and is later than the last edition of Foa on Landlord and Tenant.

I find also that *Finlay v. Bristol*, is cited and commented on as law by Mr. Justice Gwynne in *Bernardin v. The Municipality of North Dufferin* (1891), 19 S. C. R., at p. 598.

I think the weight of reason and authority is in favour of upholding the decision in *Finlay v. Bristol*, and it is conclusive of this appeal, even if a valid contract had been proved for the first year of the occupation.

But after that there was no time fixed and no certain rate to be paid, and the implied contract to pay is raised by law from the fact that the land has been occupied with the plaintiff's permission. But this obligation was co-extensive with, and measured by, the enjoyment: as soon as the occupation ceases, the implied contract ceases; and the company having paid up till the time they left are not further liable: see *Gibson v. Kirk* (1841), 1 Q. B. at p. 856, from which I have used Lord Denman's language.

The appeal should be allowed with costs and action dismissed.

Our attention has been called in this case to the fact that the Judge below has merely announced his conclusion of judgment for plaintiff for so much.

It is desirable to repeat what was said in *Haywood v. Grand Trunk R. W. Co.* (1872), 32 U. C. R., at pp. 397, 398, that the Judge in these appeals should certify the grounds of his decision.

The Court of Appeal should not be left to conjecture or to the guesses of counsel as to the methods by which the conclusion was reached. The route traversed should be at least indicated not only for the satisfaction of the suitor (who might not then appeal), but to facilitate the supervision of the appellate court if the case goes to appeal.

Generally speaking, mere "yea" or "nay" deliverances are unsatisfactory, and there is a just medium between parsimony and prolixity. Judgment.
Boyd, C.

FERGUSON, J.:—

The plaintiffs say on the record that they are a firm engaged in the manufacture of clothing in the city of Toronto. I understand, however, that such firm is composed of Nicholas Garland, the younger, only.

The defendants are an incorporated company, having their head office in Toronto and carrying on the business of manufacturing paper at the village of Campbellford.

The plaintiffs say that on or about the 1st day of October, 1896, the defendants, requiring a warehouse and office in Toronto for the purpose of storing their wares and conducting their business, leased from the plaintiffs a part of the premises of the plaintiffs at No. 76 Bay street, Toronto, the term of the said lease beginning on the 1st day of October, 1896, and the rental to be paid therefor by the defendants to the plaintiffs being at the rate of \$400 per annum, payable quarterly; that the defendants entered into possession of the premises under the lease and became yearly tenants thereof, under the plaintiffs at the said rental, and have continued such yearly tenants until the present time; that the defendants have paid all the rent due to the plaintiffs under the said lease down to the end of the quarter ending the 31st March, 1898, at the said rate of \$400 per annum; that another quarter's rent, being the sum of \$100 for the quarter ending the 30th of June, 1898, became due on the 1st day of July, 1898, and the defendants paid on account thereof the sum of \$13.33, leaving the balance \$86.67 due by the defendants to the plaintiffs on account of such quarter's rent; that a further quarter's rent, being the sum of \$100 for the quarter ending the 30th of September, 1898, became due on the 1st day of October, 1898, but has not, nor has any part thereof, been paid by the defendants to the plaintiffs.

Judgment. The plaintiffs say that the lease has not been determined by either party and the same is in full force and effect, and the plaintiffs claim from the defendants \$186.67 with interest and costs.

Ferguson, J. The plaintiffs, by way of amendment, plead a ninth paragraph in their statement of claim, saying, that prior to the 1st day of October, 1896, they (the plaintiffs) were lessees of premises at 7 Wellington street, Toronto, at a rental of \$600 per annum, and carried on their business there; that shortly before the said date the defendants applied to the plaintiffs to give up their said premises and the lease thereof, and to take a lease of other and larger premises, and to allow the defendants to occupy a portion of such larger premises for the purpose of carrying on their business therein; that the plaintiffs then, at the express request of the defendants, applied to the owners of the premises known as 76 Bay street, Toronto, for a lease thereof, and found that the said premises could not be obtained for a less rental than \$1,000 per annum; that the plaintiffs were not willing to pay a larger rental than \$600 per annum for premises in which to carry on their business, and communicated this fact and the rental demanded for the said No. 76 Bay street to the defendants, and thereupon the defendants requested the plaintiffs to take a lease of the Bay street premises at a rental of \$1,000 per annum for the term of five years, subject to being determined at the end of three years from the 1st day of October, 1896, and agreed with the plaintiffs that they (the defendants), in consideration of the plaintiffs taking the said lease and undertaking the burden thereof, and of the defendants being allowed to occupy a certain part of the said premises, would pay the sum of \$400 per annum to the plaintiffs during the continuance of the lease, and thus in effect reduce the rent payable by the plaintiffs for their place of business to \$600 per annum; that the plaintiffs accordingly, relying upon the said request and agreement of the defendants, took a lease of the said premises for the said term, and became bound to pay to the lessors

the rental of \$1,000 per annum; that the defendants, in Judgment pursuance of their said agreement, entered into and con- Ferguson, J tinued in occupation of the portion of the premises for which they had stipulated, and have paid to the plaintiffs the full amount agreed upon as aforesaid, namely, the sum of \$400 per annum down to the 31st day of March, 1898. The said lease to the plaintiffs is still in force and the liability of the plaintiffs to pay the said rent still continues, and the plaintiffs have been compelled to pay and have paid to the lessors the full rental at the rate of \$1,000 per annum for the two quarters following the 31st March, 1898, and the proportion thereof payable by the defendants to the plaintiffs at the rate of \$400 per annum is the sum of \$200, and the defendants have paid on account thereof the sum of \$13.33, leaving the sum of \$186.67 due by the defendants to the plaintiffs.

The defendants by their statement of defence, after a general denial, say that no lease between the plaintiffs and defendants such as is alleged was ever made, and they wholly deny the making of the agreement set forth by the plaintiffs by way of amendment in the ninth paragraph of the statement of claim. The defendants also plead the Statute of Frauds, saying that neither the lease nor the agreement alleged is in writing.

The defendants then say that if any such lease or agreement was entered into with the plaintiffs by one Nicholas Garland, president of the defendant company, assuming to act for the company, it was entered into without authority and for the purpose of benefiting the plaintiffs, in whom the said Nicholas Garland is interested, at the expense of the defendant company and as part of a plan or scheme between the plaintiffs and the said Nicholas Garland which it would be a fraud upon the defendant company to give effect to.

The defendants say that the only use made by them of the plaintiffs' premises was that they were allowed to use a portion of the plaintiffs' office for the purpose of transacting such business as was required to be done by them

Judgment. in Toronto, and also a portion of the cellar for the storage
Ferguson, J. of a small quantity of paper kept for the purpose of filling orders in the city, and that in connection therewith the defendants had the use of the plaintiffs' porter to receive and ship out their merchandise, the use of the plaintiffs' typewriting machine, and access to and the right to use the plaintiffs' telephone, and the right to consult the plaintiffs' commercial agency book, and to obtain reports from time to time in the plaintiffs' name as to the standing of persons desirous to purchase from the defendants on credit; and that the defendants were to pay to the plaintiffs for such use and all these privileges the sum of \$30 per month as long as the same were received by them, and that the defendants were entitled to give up such use and privileges at any time they chose, and did give up and wholly discontinued the same on the 31st day of March, 1898, and that they paid the plaintiffs in full for such use and privileges in the manner agreed upon.

The plaintiffs' reply that the lease and agreement set out are not such a lease and agreement as are required to be in writing, and that the Statute of Frauds is not applicable. They also reply setting up authority given to Garland by resolution of the directors of the company, or rather authority given to a committee of directors, of whom Garland was one, and denying the conduct on the part of Garland alleged as a fraud upon the defendant company.

The learned Judge of the County Court before whom the action was tried delivered judgment for the plaintiffs for the sum of \$186.67 with costs, but so far as disclosed, or as I have seen, did not give any reasons for his judgment, or record any specific findings of fact; nor have counsel stated any specific grounds of appeal.

As to the alleged lease from the plaintiffs to the defendants. A lease is a conveyance by which a person having an estate in hereditaments transfers a portion of his interest therein to another, usually in consideration of a certain periodical rent or other recompense, and it imports that exclusive possession is given of the premises conveyed.

In the present case there is no writing in respect of the alleged lease. It is alleged that the contract was verbal only. I have perused the evidence throughout and I am of the opinion that it was not proved or shewn that there was any contract for or any verbal conveyance of any part or portion of the plaintiffs' premises, of which the defendants were to have exclusive possession in consideration of the payment of the \$400 per annum or the \$30 per month, whichever of these was the sum to be paid. Judgment.
Ferguson, J.

Whatever ground there may be for contending that there was to be and was an exclusive possession of the office (and my conviction is against this), it cannot on the evidence be for a moment reasonably contended that there was any contract for or that there was, in fact, an exclusive possession of any part or portion of the cellar or under-story in which the defendants' merchandise was stored.

Even if the contention in favour of an exclusive possession of the office could succeed, it is not possible so to divide the amount to be from time to time paid by the defendants as to apply a portion of it as rent for the office. Nor could this as a matter of law be done in order to make out that there was a lease of the office.

I am on the whole case of the opinion that there was not a lease between the parties and that the relationship of landlord and tenant between them did not exist, and that for this reason I am not, as I think, called upon to discuss the proposition of law involved in and at the time decided by eminent Judges in the case *Finlay v. Bristol and Exeter R. W. Co.*, in the year 1852, 7 Exch. 409, 21 L. J. Exch. 117.

As to the agreement set forth by way of amendment in the ninth paragraph of the statement of claim, this is not proved by the evidence. The point sought to be made, in respect of this, was to shew that the defendants have agreed to pay the periodical payments during the continuance of the lease taken by the plaintiff of the Bay street property. Even the plaintiff himself in his answers to questions in his examination for discovery put in at the

Judgment. trial on behalf of the defence, was unable to say, and did not say, that any time was stated during which such payments were to continue.

Ferguson, J.

It is not disputed, but on the contrary it is admitted, that the defendants paid in full all the payments for the time they had any enjoyment of the rights or privileges they got from the plaintiffs, that is, till they left the plaintiffs' premises, and I am unable to see that the defendants are liable to the plaintiffs for any further sum.

I think the appeal should be allowed with costs, and the action dismissed with costs.

ROBERTSON, J., concurred with BOYD, C.

G. A. B.

MEEK V. PARSONS ET AL.

Crown—Free Grant Lands—Alienation by Agreement—Restraint on—Mistake of Title—Violation of Statute—R. S. O. (1887) ch. 25.

One object of the Free Grants and Homestead Act, R. S. O. (1887) ch. 25, is to conserve the interest of a wife from being sacrificed by a husband, and alienation of free grant land by the locatee before the issue of the patent being prohibited by the statute cannot be accomplished indirectly by entering into an agreement to complete the settlement duties and to convey after the patent is issued.

The doctrine that when the fee is in the grantee there can be no restraint upon alienation, does not apply when the grant is from the Crown.

There can be no mistake of title where a contract of sale is obtained from a locatee of a free grant lot in direct violation of an express statutory provision.

Statement. THIS was an action for an injunction to restrain the defendant from interfering with the possession by the plaintiff of a free grant lot or for a conveyance from the defendants to the plaintiff, or a return of the sum of \$400 paid as purchase money for it under the following circumstances.

One Henry Parsons became the locatee of lot 15 in the first concession of the township of Paipoonge, south of the Kaministiquia river, on the 4th of July, 1889, and subsequently became entitled to the issue of a patent.

On the 23rd of December, 1893, he and his wife, in consideration of \$400, entered into and signed an agreement with one W. J. Barrie to sell the lot to him and give him possession of it and the improvements thereon, on or before the 15th of April, 1894, and to procure the patent "after settlement duties had expired:" the money was paid, and he was put in possession in May, 1894, and had been in possession ever since. Statement.

Parsons applied for his patent on the 14th of May, 1894, and it was issued to him on the 4th of August of the same year.

He and his wife then left the district, and after being absent for some time, returned and sought to obtain possession of the lot from Barrie, and an injunction restraining him from interfering was granted by the local Judge on the 5th of November, 1895.

During the pendency of the action both the plaintiff and the male defendant Parsons died, and it was continued by the plaintiff as administrator of Barrie against Parsons' wife and co-defendant, who became his administratrix.

The action was tried at Port Arthur on the 9th of June, 1899, before MACMAHON, J., without a jury, and a perpetual injunction was claimed.

F. H. Keefer, for the plaintiff.

F. R. Morris, for the defendant.

Correspondence between the parties during the absence of Mr. and Mrs. Parsons was put in tending to shew a proposal by them after the issue of the patent to buy back the property or give a ratifying deed to Barrie, and that there was then no dispute as to their respective rights.

July 5, 1899. MACMAHON, J. :—

The Free Grants and Homesteads Act, R. S. O. (1887) ch. 25, sec. 16, provides that neither the locatee, nor any one claiming under him, shall have power to alienate (other-

Judgment. wise than by devise) or to mortgage or to pledge any land
MacMahon, located as aforesaid, or any right or interest therein before
J. the issue of the patent.

17. No alienation (otherwise than by devise), and no mortgage or pledge of the land, or of any right or interest therein by the locatee after the issue of the patent, and within twenty years from the date of the location, and during the lifetime of the wife of the locatee, shall be valid or of any effect, unless the same be by deed in which the wife of the locatee is one of the grantors with her husband, nor unless such deed is duly executed by her.

Section 19 provides that "On the death of the locatee, whether before or after the issue of the patent for land so located, all his then right and interest in and to the land shall descend to and become vested in his widow during her widowhood in lieu of her dower."

Section 20. (1) No land located as aforesaid, nor any interest therein, shall in any event be or become liable to the satisfaction of any debt or liability contracted or incurred by the locatee, his widow, heirs or devisees, before the issuing of the patent for the land.

(2) After the issuing of the patent for any land, and while the land or any part thereof, or interest therein, is owned by the locatee or his widow, heirs or devisees, such land, part or interest, shall during the twenty years next after the date of the location be exempt from attachment, levy under execution, or sale for payment of debts, and shall not be or become liable to the satisfaction of any debt or liability contracted or incurred before or during that period, save and except a debt secured by a valid mortgage or pledge of the land made subsequently to the issuing of the patent.

Mr. Keefer's contention was that there was no alienation of this land by the locatee, that he simply contracted to complete the settlement duties and after the settlement duties were performed and patent issued, that he and his wife then agreed to convey to Barrie.

That argument simply amounts to this: What the statute

prohibits being done directly, can in the way suggested be accomplished indirectly.

Judgment.

MacMahon,
J.

If that contention were to hold good, the restraint on alienation provided by the statute could be evaded with the greatest facility, for all the intending purchaser would require, would be to obtain from the locatee and his wife, an agreement to convey upon the patent being issued, and after the issuance of the patent the agreement could be enforced in an action for specific performance. One object of the statute was to conserve the interest of the wife from being sacrificed by the husband. The whole intent and object of the clauses of the statute would be defeated if the doctrine of estoppel were given effect to: *Doe d. Tiffany v. McEwan* (1837), 5 O. S., at p. 606; *Chapiewski v. Campbell* (1898), 29 O. R. 343.

The other point urged by Mr. Keefer was that where the fee is in the grantee, there can be no restraint on alienation. That does not apply where the grant is from the Crown, and I refer to it to shew that the point has not been overlooked. The lord might have restrained alienation of his tenant by condition, because the lord had a possibility of a reverter, and so it is in the King's case at this date, because he may reserve a tenure to himself. In Sheppard's Touchstone, p. 130, it is said: "But if the condition be that the feoffee or grantee shall not alien the thing granted to any person whatsoever, or, that if he do alien to any person, that he shall pay a fine to the feoffor; these conditions are void in the case of a common person as repugnant to the estate. But in case of the King, such conditions are good." So in Chitty's Prerogatives of the Crown, 386, note (h), he says: "But it seems that the King may convey in fee with a condition restraining the grantee from alienating." And the Master of the Rolls in Ireland, in *Fowler v. Fowler* (1866), Ir. Ch. Rep., vol. 16, p. 507, decided that the Crown by its prerogative, may annex a condition against alienation to a grant in fee.

The plaintiffs ask if the defendants are held entitled to succeed that there should be a reference as to the value of

Judgment. the improvements made by the plaintiffs under mistake as to title.
MacMahon,

J.

There could be no mistake as to title where the plaintiffs' testator obtained a contract of sale from the locatee in the face of, and in direct violation of the express statutory prohibition in the statute.

There must be judgment for the defendant dismissing the plaintiff's action with costs, and declaring that the defendant is the owner of the lands, and that she is entitled to immediate possession thereof and to have the caution discharged. She is also entitled to the mesne profits since the date of the injunction, and to damages arising from the issue of the injunction; and if the parties cannot agree as to the mesne profits and damages, there will be a reference to the local Master at Port Arthur.

The defendant is to have the costs of the counterclaim.

G. A. B.

[DIVISIONAL COURT.]

RICE V. RICE ET AL.

Fraudulent Conveyance—Husband and Wife—Separate Income—Payment of to Husband—Gift—Presumption.

A married woman having separate estate paid over her income therefrom to her husband who treated it as his own, and used it towards paying the ordinary family expenses without keeping a separate account, paying her no interest and giving no acknowledgment, all her business matters being under his management. After many years of this kind of dealing the husband who had for some time been largely indebted to the plaintiff, being pressed for payment immediately made a conveyance of his property to his wife without her knowledge, and without her being informed of the fact, the consideration for which it was sought in this action to support by alleging that the payments to the husband had been made as loans :—

Held, that the onus of proof that payments of income to her husband were by way of loan, and not of gift was on the wife, and that the evidence of both defendants, being without corroboration, did not support the allegation, and the conveyance was set aside as fraudulent against creditors.

THIS was an appeal from the judgment of the trial Judge Statement. in an action brought to set aside a conveyance of real estate and a transfer of money, made by a husband to his wife as fraudulent against creditors.

The action was tried at the non-Jury Sittings held in Toronto on the 2nd March, 1898.

Wallace Nesbitt, and *H. W. Mickle*, for the plaintiff.
Johnston, Q.C., and *Heighington*, for the defendants.

The following cases were referred to by the learned Judge and discussed during the argument: *Warner v. Murray* (1889), 16 S. C. R. 720; *Hopkins v. Hopkins* (1883), 7 O. R. 224, and *Dufresne v. Dufresne* (1885), 10 O. R. 773.

The facts sufficiently appear in the judgments in the Divisional Court.

At the close of the argument the following judgment was delivered by

Judgment. **MEREDITH, J. :—**

Meredith, J.

The main question for consideration in this case is one of fact. The question for consideration in all cases of this class is really the question of fact, whether contrary to the Statute of Elizabeth, or the Provincial Act, a wrong has been done, a fraud committed. The important enquiry is, with what intent was the transfer made ?

Judges may lay down rules, they may adopt principles, in regard to cases of this kind ; but they all can have but one object in view, that is, the proper way of ascertaining the fact, reaching the truth, on the question of the purpose and intention with which the transaction took place.

I must find that these transactions are tainted with fraud, else the plaintiff cannot succeed. It is he who is attacking them.

The question is obviously a difficult one, in many cases, because we cannot directly read the minds of the parties ; we cannot read their thoughts and intentions ; we have to determine what their thoughts and intentions were in the best way we can, and they are seldom shewn by statements made by them at the time, which would condemn them, or by writings, although occasionally there are such cases. The mind must be read by the acts of the parties, in the light of the surrounding circumstances ; and in most cases, though a difficult task, a right conclusion is reached.

Where there is no consideration for a conveyance made by a person in embarrassed circumstances, one at once says it is obvious that the conveyance was made for the purpose of defeating creditors ; what other object could there be ?

If another sufficient object can reasonably be suggested, or where a payment of money has been made or any other valuable consideration has passed, it is obviously more difficult to come to the conclusion that the transaction cannot stand, that there was no real intention in good faith to do that which the transfer accomplishes.

Now, the one important question of fact in this case is

whether there was or was not any consideration. As to Judgment. that, upon the whole evidence before me, I must reach Meredith, J. the conclusion that there was; that there was a debt existing at the time the conveyance was made, created at the time these payments were made, from husband to wife. Unquestionably the wife's money passed into his hands, and no one says there was any gift. If nothing had been said, the strong inclination in my mind would be to hold, as a matter of fact, apart from any rule in equity, that there was a gift; but here the debtor has testified to the debt, and the creditor has testified to the debt, and I am favourably impressed with the testimony of the creditor; I am not prepared to say she has wilfully stated what was not true; and, unless I am prepared to say that, I cannot reach the conclusion that there was no debt existing between the parties.

Then there was a valid consideration; that consideration was a pre-existing debt. Neither that consideration, nor any consideration will save the transaction if it really took place for the purpose of defeating creditors. If the wife had known that her husband was in embarrassed circumstances, that would be a fact tending to shew that intention: and in some cases might be conclusive; I mean conclusive as a matter of fact; that which ought to be implied, as a matter of fact, in the circumstances; but I cannot find that she was aware he was in embarrassed circumstances at the time this conveyance was made.

And I do find that there was a pre-arrangement, made in the month of April, under which the husband was to make, and ought to have made, a deed of the property at an earlier date—earlier I mean than the date of the conveyance. That was not done; but the case ought to be looked at as if it had been done when it ought to have been done. I have no manner of doubt that the husband was driven to make this conveyance, at the very time when made, by the proceedings taken on his brother's behalf to compel him to pay the large debt which he owes to that brother. But the wife was not aware of

Judgment. that ; and, as I said before, the matter is to be taken as if
Meredith, J. the conveyance had been made at the time it ought to have been made.

Where there is a valid consideration, the rule is that the intention to commit the fraudulent act there must be on the part of both transferrer and transferee.

I do not think this conveyance has been successfully attacked under the Statute of Elizabeth, or under the Provincial Act.

The defendants' position as to the money is quite strong ; there was a good debt, the relationship of debtor and creditor existed between husband and wife ; when he could not pay in money he gave the property in question in payment.

Upon the whole evidence I am obliged to consider that the plaintiff has not made out his case, and that the action must be dismissed ; but for the reasons I have before indicated I shall not give costs to either of the defendants. I think they have brought this law suit upon themselves. The plaintiff was quite justified in investigating these things, which upon their face had a very suspicious appearance,—*prima facie* may have seemed a transaction which ought to be set aside.

The action will be dismissed, without costs.

From this judgment the plaintiff appealed, and the appeal was argued on the 12th and 13th September, 1898, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ.

Aylesworth, Q. C., and *H. W. Mickle*, for the appeal. The plaintiff is a judgment creditor on a note for money lent, a large portion of which went into the house built on the property in question. The evidence shews the money was transferred and the conveyance made almost contemporaneously with the threatened proceedings to collect the note. Everything was done voluntarily, and without the wife's knowledge. She did not even know what was

done with the money after it was transferred to her. The trial Judge erred in finding that the wife was a creditor of the husband, and that therefore there was a consideration for the conveyance and transfer. She never was a creditor. The moneys she handed to the husband were gifts, and could not be recovered back by her, although they are now claimed to have been loans. She recovered a judgment for her alleged claim against her husband and did not even give credit for the nominal consideration for the conveyance. The moneys handed to him were not the corpus of her estate, but mere annual income. We refer to *Caton v. Rideout* (1849), 1 MacN. & G. 599; *Edwards v. Cheyne* (1888), 13 App. Cas. 385; *Peacock v. Monk* (1750), 2 Ves. Sr. 190; *Alexander v. Barnhill* (1888), 21 L. R. Ir. 511; *Beresford v. The Archbishop of Armagh* (1844), 13 Sim. 643; *In re Flamank, Wood v. Cock* (1889), 40 Ch. D. 461, followed in *Briggs v. Willson* (1897), 24 A. R. 521; *Hopkins v. Hopkins* (1883), 7 O. R. 224; *Dufresne v. Dufresne* (1885), 10 O. R. 773, at pp. 777, 778; *Oliver v. McLaughlin* (1893), 24 O. R. 41; *Irwin v. Freeman* (1867), 13 Gr. 465.

Johnston, Q. C., and *Heighington*, contra. The evidence of both defendants shews the moneys were not gifts but loans to the husband, in many instances paid by her personal cheques. The plaintiff's claim was no higher than the wife's. There was no effort on her part to defeat creditors, but merely to secure performance of the agreement originally made to secure her. She was not aware that he was in debt, and notice to him is not notice to her. The payment of the money is not reached by the statute, R. S. O. ch. 147, sec. 3, if there is a debt. It makes no difference whether the money was income or corpus if there was, as here, an agreement to repay, and the wife could insist on security: *Hope v. May* (1897), 24 A. R., per Hagarty, C. J. O., at p. 23; *Lawson v. McGeoch* (1893), 20 A. R., per Osler, J. A., at p. 471; *Montgomery v. Corbit* (1895), 24 A. R. 147; *Webster v. Crickmore* (1898), 25 A. R. 97; Lush's Law of Husband and Wife, 2nd ed., p.

Argument.

Argument. 178 *et seq.*; *Rowe v. Rowe* (1848), 2 DeG. & Sm. 294; *Woodward v. Woodward* (1863), 3 D. J. & S. 672.
Mickle, in reply.

June 19, 1899. ARMOUR, C. J.:—

The female defendant is the daughter of the late Thomas Lailey, and was married to the male defendant twenty-eight or twenty-nine years before the trial of this cause.

In January, 1871, the said Thomas Lailey gave the female defendant \$500, and on the 23rd December, 1876, he wrote to her the following letter :

“ Toronto, December 23rd, 1876.

“ Dear Daughter Rebecca,

“ I propose shortly investing the sum of five thousand dollars which you will receive the interest of, for your own use and doing the same for Emma for her use, and as I cannot invest the amount at present, I intend to pay you and her the sum of four hundred dollars annually, say \$200 on the 2nd day of January and \$200 on the 2nd day of July—a cheque for the first payment is enclosed.

“ The principal sum of five thousand dollars if invested and handed over to you would be a charge against that portion of my estate you will be entitled to receive, but the half-yearly amount paid until then, or the interest arising from the principal sum, if invested, is to be a gift and not to be a charge in any way. And to prevent any misunderstanding of my intentions should it arise let this letter be preserved.”

This sum of \$200 was paid by Thomas Lailey to the female defendant half-yearly up to and including January 2nd, 1879, and from that time till his death in June, 1891, the sum of \$100 was paid by him to the female defendant.

By the will of the said Thomas Lailey these payments were to be continued for one year after his decease, and accordingly \$100 was paid to her on July 6, 1891, and \$100 on January 5, 1892, by the executors.

And by the said will \$15,000 was to be set apart and Judgment. invested, and the interest therefrom was directed to be Armour, C.J. paid to the female defendant for her separate use.

Accordingly there was paid to her by the executors thereafter, the following sums at the following dates :

1893, July 5.....	\$450 00
1894, Jan. 23.....	350 00
July 28.....	350 00
1895, Jan. 22.....	450 00
July 4.....	450 00
1896, Jan. 27.....	350 00
Aug. 5.....	350 00

All the above sums were paid by the cheques of Thomas Lailey in his lifetime, and after his decease by the cheques of his executors ; and all the said cheques were made payable to the female defendant, and were all endorsed over by her to the male defendant, who drew the money thereon and used the same in like manner as his other money.

The law as to such a dealing by the wife with the income of her separate estate is laid down by Lord Chancellor Cottenham in *Caton v. Rideout* (1849), 1 MacN. & G. 599, as explained by Lord Watson in *Edwards v. Cheyne* (1888), 13 App. Cas. 385. Lord Cottenham in *Caton v. Rideout*, said : "The question depends entirely upon the force of the evidence before me, upon which alone I can proceed ; for there is no doubt whatever about the rule of law, or rather the rule of equity. A wife having property settled for her separate use is entitled to deal with the money as she pleases. If she directly authorizes the money to be paid to her husband he is entitled to receive it, and, she can never recall it. No direct authority has been produced which affects the case before me. If the husband and wife living together have for a long time so dealt with the separate income of the wife, as to shew that they must have agreed that it should come to the hands of the husband to be used by him (of course for their joint purposes), that would amount to evidence of a

Judgment. direction on her part, that the separate income, which she Armour, C.J. otherwise would be entitled to, should be received by him," at p. 601.

In this case the female defendant directly authorized the money to be paid to the male defendant by endorsing the cheques over to him.

Lord Cottenham then proceeded to discuss the evidence in the case before him, and said: "Having come to this conclusion," that is, the conclusion that the wife directly authorized the payment of the money to the husband, "on the evidence, the result is that the rule, which is acquiesced in, and not disputed by the Vice-Chancellor,—that separate money of the wife paid to the husband, with her concurrence or by her direct authority, to be inferred from their mode of dealing with each other, cannot be recalled,—must be applied to the present case. If I were to hold the contrary, I do not know to what extent such a decision would go. In ninety-nine cases out of a hundred separate property, which is introduced as a protection to the wife, does not take effect: all things going right: and no distinction being made, the question of separate property does not arise; the property is used as a common fund for the benefit of the family, and in that way naturally falls under the control and management of the husband. If, however, it be once assumed that the wife by herself, or by those who represent her, may call upon the estate of the husband or the husband himself to repay the money so far as they can trace it, it is impossible to tell what confusion might not be introduced into a family, for the wife might say, that certain stock had been bought with her separate property, even when there was positive proof of an appointment by her in favour of her husband. The practice between the husband and wife is proper evidence to shew acquiescence and concurrence," at pp. 603, 604.

And Lord Watson in *Edwards v. Cheyne*, referring to the case of *Caton v. Rideout*, said "the expression 'of course for their joint purposes,' occurring in the first of these quotations, may appear to be somewhat ambiguous; but it

is obvious from his decision that the noble and learned Judgment.
Lord merely intended to say that the wife's tacit assent to Armour, C.J.
her husband's receiving and using her separate income for
joint family or other purposes would constitute an effectual
gift, whether the sums received by her husband were
expended on these purposes, or were allowed to accumu-
late," at p. 392.

The male defendant had been for some three or four
years largely indebted to the plaintiff, and one of the
claims sought to be recovered in this action was a promis-
sory note dated the 17th October, 1896, made by the male
defendant, payable six months after the date thereof, to
the order of the plaintiff, for the sum of six thousand
dollars, with interest at the rate of six per cent. per
annum.

This note fell due on the 30th April, 1897, and on the
22nd April, 1897, the male defendant paid to the credit of
the female defendant in a savings bank the sum of \$1,000.

The plaintiff thereafter placed this note in the hands of
his solicitors for collection, who wrote to the male defen-
dant the following letter:—

"Toronto, 16th June, 1897.

"Dear Sir:—Mr. W. H. Rice has placed in our hands
for collection a note made by you in his favour, dated 17th
October last, at six months for \$6,000, with interest at six
per cent. We hope that you will be able at once to make
such arrangements for settling this as will render any pro-
ceedings unnecessary."

This letter was received by the male defendant on the
16th June, 1897, and on the following morning, the 17th
June, 1897, he went to St. Catharines and had the
impeached conveyance drawn from himself to the female
defendant for the expressed consideration of \$2,000, and
had the same registered, and paid to the credit of the
female defendant, in the same savings bank, the sum of
\$700.

The female defendant was not aware of these transactions
for some time after.

Judgment. And it appeared that the female defendant left the Armour, C.J. entire management of her affairs and business to the male defendant.

The male defendant thereupon, on the same 17th June, 1897, wrote to the plaintiff's solicitors as follows:—

“Toronto, June 17th, 1897.

“Dear Sirs:—Yours of the 16th received. I do not think it will be necessary for my brother to sue me for anything that I may owe him. I think matters can be arranged. It will be very sad if we have to go into Court. I will go over and see him, and I trust will be able to make some arrangements with him.”

No arrangements having been made, and the plaintiff becoming aware of the transfers and conveyance above set forth from the male defendant to the female defendant, brought this action on the 29th June, 1897.

After this action was commenced, the male defendant made up an account of all the money received by him, the proceeds of all the cheques above mentioned, as having been endorsed over to him by the female defendant, amounting in all to the sum of \$6,850, and credited thereon the sums of \$1,000 and \$700 paid by him to the credit of the female defendant in the savings bank as above mentioned, shewing a balance of \$5,150.

And on the 11th September, 1897, the female defendant commenced an action to recover this balance from the male defendant by writ specially endorsed, as follows:—

“The plaintiff's claim is for the sum of \$5,150 for money lent. The following are the particulars: To money lent by the plaintiff to the defendant.” (Setting out the dates and amounts of the money received by the male defendant from the female defendant as set forth in the account made up by him, amounting to the sum of \$6,850, and crediting thereon the said sum of \$1,700, leaving a balance of \$5,150.)

This writ having been served, and no appearance having been entered, judgment was signed on the 22nd day of

September, 1897, for the said sum of \$5,150 and costs to be taxed. Judgment.

Armour, C. J.

"There is a great difference between the receipt of the income of a wife's separate property by her husband and of the *corpus*.

"In the latter case, the onus of proof of a gift by the wife to the husband lies upon him, and must be clearly established, or else the husband will be held to be a trustee for his wife.

"In the former the onus lies on the wife, save, perhaps, as to the last year's income, and she must establish clearly and conclusively that her husband received her income by way of loan": *Alexander v. Barnhill* (1888), 21 L. R. Ir. 511, at p. 515.

The defendants set up on the trial of this cause that these several sums received by the male defendant from the female defendant were all loans, and so understood to be between them at each time each sum was received.

If we are to believe implicitly what the parties to a fraudulent transaction swear to in regard to it, any further attempt to set aside fraudulent transactions might as well be abandoned.

But it is our duty to consider the interest such parties have in upholding the impeached transaction, and the motives inducing them to enter into it, to see whether their story is corroborated, if not by independent testimony, at all events by the circumstances attending the transaction, to see whether it is reasonable and probable, and whether it is consistent with their conduct relating to the transaction, and with the circumstances surrounding it.

The parties here are both interested in upholding the impeached transactions, and to that end in shewing that these sums were loans, the motive prompting the female defendant may be inferred from her interest, the motive prompting the male defendant was to hinder the plaintiff in getting his money as is apparent from his hastening, immediately upon receipt of the letter of the plaintiff's solicitors, to St. Catharines to execute the impeached con-

Judgment. veyance and to transfer the \$700 to the female defendant
. Armour, C.J. and by the celerity which he subsequently exhibited in transferring the money he had in the bank to the safer receptacle of his own pocket.

Their story is not corroborated either by independent testimony or by any of the circumstances attending the transaction, and corroboration in such a case as this was thought, and I think rightly thought, to be essential in *The Merchants Bank of Canada v. Clarke* (1871), 18 Gr. 594.

It is neither reasonable nor probable nor consistent with their conduct and with the circumstances attending the receipts of those sums.

These sums, thirty-nine in number, and extending during a period of twenty-five years, are all said to have been loans, no account kept of them, no voucher taken for them, no stipulation for the repayment thereof or for interest thereon, and no account kept in the books of the male defendant shewing a credit to the female defendant in respect of any of them.

The conduct of the defendants with respect to, and the circumstances attending their dealing with these sums are totally inconsistent with the idea of their being loans; and I think it ought to have been found and ought now to be found that they were not loans.

It is quite clear, however, in my opinion, that the impeached conveyance was purely voluntary. It is expressed to have been made in consideration of \$2,000, and it is attempted to support this consideration as a part of the sums alleged to have been loaned, but this attempt fails when we find that the female defendant subsequently to the making of the impeached conveyance recovered judgment against the male defendant for the whole amount of the sums alleged to have been loaned, except the sum of \$1,700 paid by the male defendant to her credit in the savings bank.

In my opinion the impeached transfers and conveyance were and are fraudulent and void as against the plaintiff, and ought to be so declared, and the plaintiff ought to have his costs of this suit.

FALCONBRIDGE, J.:—

Judgment.

I concur.

Falconbridge,
J.

STREET, J.:—

I entirely agree with the conclusions at which the Chief Justice has arrived.

It appears that the moneys which are alleged to have been loaned, from time to time, by the wife to the husband, and which are relied upon as furnishing the consideration for the conveyance by the husband to the wife, are certain moneys to which she became entitled as income under the will of her father; and which her husband has received half-yearly for the twenty-five or twenty-six years before the conveyance in question was made.

These moneys have been treated by him as his own, and have formed part of the fund out of which all his disbursements, including the expenses of the family for living, clothing, education of children, etc., were made. No separate account was ever kept of them: no promise to repay them was made: no interest was ever paid or agreed to be paid upon them, and no acknowledgment of them was ever given.

At the end of twenty-five or twenty-six years of this sort of dealing, the husband being indebted to his brother, the plaintiff, upon a note for \$6,000, and being pressed for payment by a solicitor, immediately made a conveyance to his wife of the property in question, being practically his whole assets, without her knowledge, and without her being informed of the fact, apparently for some time afterwards.

The conveyance is sought to be supported upon the theory, that these payments from the estate of the wife's father, received by the husband from time to time, were to be treated as a series of loans, and the learned Judge who tried the case has so treated them.

The cases, referred to in the judgment of the Chief

Judgment. Justice, do not appear to have attracted the attention of
Street, J. the Judge at the trial; and it appears to me, that the principles laid down in them, and the reasoning upon which those principles are founded, are directly in point in the present case, and cannot be overlooked.

The presumption in the case of dealings, such as we find here, by a husband with his wife's income, agreed to by her, is directly against the theory of a series of loans. The evidence to the contrary of the presumption strikes me as being of the most unsatisfactory character, especially that which is to be found in the cross-examination for discovery of the parties.

The husband says, that he kept books of account up to five years ago, but he does not produce them. He says that he made up his account, against his wife *since this action was begun* from an old book which was in existence when the account was made up, but which he destroyed after making up the account:

77. Q. You have an account here that you made up? (Account produced.) A. Yes, sir.

78. Q. Will you tell me how you made up that account, what process you went through in making up the account? A. I had a memo. in an old book which this account is made from.

79. Q. Where is that memo.? A. That is destroyed.

80. Q. When did you destroy it? A. Some time ago, after I had made up this account.

The wife says repeatedly in her cross-examination, that she left her whole business matters absolutely in her husband's hands.

The only contemporaneous written evidence of their dealings has, therefore, been destroyed by the husband after the present action was begun.

In my opinion it is impossible, upon a careful consideration of the evidence before us, to come to the conclusion, that any debt existed from the husband to the wife; or to come to any other conclusion than that the consideration for the transfer of the property here attacked, was trumped up at the last moment for the purpose of removing it from the reach of the husband's creditors.

[DIVISIONAL COURT.]

BROWN V. GRADY ET AL.

Infant—Mortgage—Covenant for Payment—Approval of Master—Mistake—Repudiation—Delay.

The defendant was one of several *cestuis que trust* who joined with their trustee in a mortgage for the purpose of discharging a lien upon the trust estate. It was recited in the mortgage deed that they had agreed to join therein in order to vest all their interests in the mortgagee, but subject to the terms of the mortgage. The defendant was then an infant under nineteen years of age, but that fact did not appear on the face of the instrument, in which she was made to covenant for payment of the mortgage money. The instrument was marked "approved" by the Master (who had directed the trustee to execute the mortgage) but not by the official guardian. It was stated, however, at the bar that the latter did approve on behalf of the infant, and that some pencil marks on the instrument signified his approval. No order was shown requiring execution by the infant. Nearly two years after the defendant came of age she was served with the writ of summons in an action by the mortgagee upon the covenant for payment, and, as she did not appear, judgment was signed against her. Two years later she moved to have the judgment set aside:—

Held, that it was contrary to proper practice to have such a covenant on the part of an infant; and its presence was only to be explained by supposing that the Master's attention had not been called to the fact of infancy. The covenant was void, as the infant had received no benefit from it and had been induced to enter into it *per incuriam*; and the delay was not material—the applicant being ignorant of her rights and not called on to disaffirm what was from the outset to her prejudice.

AN appeal by the defendant Bertha Grady from an order Statement. of Mr. Cartwright, an official referee, sitting for the Master in Chambers, made on the 12th June, 1899, dismissing a motion by the appellant to set aside a judgment signed against her personally, in April or May, 1897, in an action to enforce a mortgage. The judgment was against the appellant and several other defendants, who had covenanted in the mortgage deed for payment of the mortgage money. The mortgage was made in January, 1893, and was executed by the appellant while yet an infant under nineteen years of age. The plaintiff advanced money upon the mortgage for the purpose of freeing the mortgaged estate, in which the appellant had an interest, from the lien of a trustee, as explained in the judgment of the Chancellor. The action was not begun until two years

Statement. after the appellant came of age; she did not appear, and judgment was signed against her for default in 1897. She did not repudiate the mortgage or the covenant until, in February, 1899, she launched the motion to set aside the judgment in so far as it was against her personally, upon the ground that she was not bound by the covenant entered into during her infancy.

The appeal was heard by BOYD, C., in Chambers, on the 19th June, 1899.

J. R. Roaf, for the appellant.

F. E. Hodgins, for the plaintiff.

June 20, 1899. BOYD, C. :—

Upon the papers before me, it appears that the mortgage of January, 1893, was signed by the appellant, Bertha Grady, while yet an infant under the age of nineteen years. The liability arose upon taking trust accounts before the Master, when it was reported that there was due to the trustee for compensation and costs \$1,196, which was declared to form a lien or charge on the trust estate. It was declared to be disastrous to sell the trust estate at that time, and the Master directed the trustee to mortgage the lands in question for sufficient to pay off the lien and costs. That was sufficient to justify the mortgage, but not the personal covenant of the infant.

The infant was one of several *cestuis que trust*, and it is recited that they have agreed to join in the mortgage in order to vest all their interests in the said mortgage, but subject to the terms of the mortgage. The infant was therein made to covenant for the payment of the mortgage money. The instrument of mortgage is marked approved by the Master in Ordinary, but it does not appear on the face that any of the parties were infants, nor is it marked or approved by the official guardian.*

* On the back of the instrument were the initials "J. H." in pencil. It was argued that their presence signified the official guardian's approval.

No order is produced requiring it to be executed by the infant. Judgment.
Boyd, O

I find it difficult to believe that the instrument would have contained any covenant on the part of the infant, had the Master's attention been drawn to the fact of infancy. It is, at all events, contrary to all proper practice to have such a covenant on the part of the infant. In *Tyler on Infancy* it is said: "If the order merely directs the infants to convey their interest, personal covenants inserted in the deed executed on their behalf, are void:" 2nd ed., p. 307. And in *Re Ellison* (1821), 5 Johns Ch. 261, Mr. Chancellor Kent refused to make an order that the infants should enter into personal covenants. He said they could not be so bound. As a rule in the Master's office, conveyances settled for infants to execute contain no personal covenants. I take the present covenant to be void—one for which the infant received no benefit, and one into which she was induced to enter *per incuriam*. The fault having been committed by the Court, it is not for the Court further to complicate the mischief by making the covenant now fall upon the lands and property of the appellant.

No personal relief should be given in this action on the covenant: no costs.

I do not think the delay material—the applicant being ignorant of her rights, and not called on to disaffirm what was from the outset to her prejudice.

From the Chancellor's order setting aside the judgment the plaintiff appealed, and his appeal was heard by a Divisional Court composed of MEREDITH, C. J., and ROSE, J., on the 5th September, 1899.

F. E. Hodgins, for the appellant. The question is whether the infant is entitled to have the judgment set aside except upon terms of giving up the benefit which she has received. The infant was represented by the official guardian, and he approved of the mortgage, as shewn by his initials on the back of the instrument. [MEREDITH, C. J.—But there should have been no covenant on the part

Argument. of the infant. It must have been inserted by mistake.] The plaintiff now offers, and he made the same offer in Chambers, both before the referee and the Chancellor, to reduce the judgment against the appellant to a proportionate share of the whole liability. [MEREDITH, C. J.—The recitals make it manifest that it was a mistake of the draftsman to insert the covenant.] There is everything to shew that it was done advisedly, and the Court ought not to say to the plaintiff, who advanced money on the security, that he is not entitled to the security. [MEREDITH, C. J.—Was it a proper thing under any circumstances?] The Court and the Master and the official guardian had nothing to do with her power to execute the covenant; she had that power without them. Of course she can repudiate, but must do so promptly and on proper terms: *Foley v. Canada Permanent Loan and Savings Co.* (1883), 4 O. R. 38; *Whalls v. Learn* (1888), 15 O. R. 481; *McDougall v. Bell* (1863), 10 Gr. 283; *Gilchrist v. Rumsay* (1868), 27 U. C. R. 500; *Confederation Life Association v. Kinnear* (1896), 23 A. R. at p. 503. The action of the officers of the Court does away with the assumption that she did not understand. She ought to have repudiated when served with the writ of summons in this action, if not before.

J. R. Roaf, for the defendant Bertha Grady, was not called upon.

MEREDITH, C. J. :—

We agree with the judgment of the Chancellor upon both points. The covenant should not have been in the deed, and the defendant has not delayed too long, under the circumstances.

ROSE, J., concurred.

Appeal dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

REGINA V. GRAHAM ET AL

Criminal Law—Rape—Evidence—Statement of Prosecutrix.

On a charge of rape it was sought to give in evidence statements made by the prosecutrix on the day following the alleged assault to a police inspector who called upon her with reference to the matter :—

Held, that the evidence was inadmissible. The statements were not made as the unstudied outcome of the feelings of the woman, nor as speedily after the occasion as could reasonably be expected.

THIS was a Crown case reserved by ROBERTSON, J.

Statement.

As the case stated, the prisoners were tried before him on May 19th, 1899, at Toronto, on an indictment for rape, under sec. 266 of the Criminal Code, 55-56 Vict. ch. 29 (D.), the said offence being alleged to have been committed upon the person of one Emily Calder, on February 18th, 1899. The case proceeded as follows :—

“The evidence of the complainant, Emily Calder, was to the effect that on the forenoon of the 18th of February, 1899, while going through a lane from Gildersleeve place to Spruce street, in the city of Toronto, she was attacked by several men, the three prisoners being positively identified by her ; that she was seized and dragged into a place off the lane and knocked down, and that the men in question pulled her clothes up over her knees and ravished her, and she became unconscious. On cross-examination she admitted that she could not say positively whether or not connection was actually had with her by any or all of the young men, as she had become unconscious, but her private parts had been sore for some days after. She stated that she cried out as loud as she could, and when she came to her senses she was assisted by two women, Mrs. Johnston and Mrs. Thompson. She stated to them that she had been knocked down by some boys in the lane and that

Statement. they had pulled her clothes up to her knees, but in her dazed condition she did not complain to Mrs. Johnston and Mrs. Thompson that she had been ravished, nor did they hear any cries for help. They brushed the ashes off her clothes, and her son, George Calder, came and took her home. George Calder swore that he saw the three prisoners running away as he came into the lane. She did not complain to her son or to her husband that she had been ravished, giving as her reason that her husband was a man of violent temper and she was afraid to tell him. Mrs. Calder walked home and washed her dishes, but remained in the house and suffered from her injuries for two days; no doctor was called in. The same evening, the 18th of February, Robert Armstrong, an inspector in the city police force, received a complaint from Mrs. Johnston and Mrs. Thompson that Mrs. Calder had been assaulted in the lane in question. Inspector Armstrong called upon the complainant at her home in the forenoon of the 19th of February, about half-past ten, when she complained to him that she had been criminally assaulted in the lane in question, and mentioned the names of the three prisoners as the men who had assaulted her. In reply to the direct questions of Inspector Armstrong, 'Had they any connection with you, Mrs. Calder?' she said 'Yes.' She further said she had shouted, and stated how they (naming the three prisoners) had kept their hands upon her mouth and that each one had relieved the other according as the turn came.

Mr. Robinette, for the prisoners, contended the statements so made by the complainant to Inspector Armstrong, on the forenoon after the assault, were not properly admissible as evidence against the prisoners, they not being present, and should have been rejected. I decided to receive the evidence in view of the following: The woman's statement was that she was knocked senseless; she did not know and could not know what was going on, so she said; and she may not have sufficiently recovered, and not being a very strong woman intellectually, she might not have

known, and there might have been a sort of fear in her mind to tell two women who were strangers to her what had taken place; but after considering the whole thing over night, and the police officer coming, she might then have come to a conclusion as to what had taken place. As she said, they must have done that because she felt sore at certain parts, and she had received a blow over the head. Statement.

The jury found the prisoners not guilty of the charge of rape, but found them all guilty of indecent assault. There was evidence upon which the jury might find the verdict of indecent assault apart altogether from the evidence of Inspector Armstrong.

At the request of counsel for the prisoners, I have reserved for the consideration of a Divisional Court of the High Court of Justice the following question:—Was I right in admitting the evidence of Police Inspector Armstrong as to the above particulars of the complaint and statements made by Emily Calder to him on the forenoon of Sunday, the 19th day of February, A. D. 1899?"

The above case came up for argument before BOYD, C., and ROBERTSON, JJ., on June 16th, 1899.

T. C. Robinette, and *J. M. Godfrey*, for the prisoners, contended that the evidence was inadmissible, as the statements were not made immediately after the alleged offence; if they had been made then and there to the two women, they would have been within *Regina v. Lillyman*, [1896] 2 Q. B. 167; but they were not made till the following day, and were no part of the *res gestæ*. The first person met would seem the proper person to make such complaints to: *Regina v. Eyre* (1860), 2 F. & F. 579; *Regina v. Wood* (1877), 14 Cox 46; *Regina v. Little* (1883), 15 Cox 319; *Regina v. Megson* (1840), 9 C. & P. 420; *Regina v. Osborne* (1842), C. & M. 622; *Rex v. Clarke* (1817), 2 Stark. N. P. 241; *Regina v. Nicholas* (1846), 2 C. & K. 246; *Rex v. Wink* (1834), 6 C. & P. 397; *Rex v. Foster* (1834), 6 C. & P. 325; *Aveson v. Lord Kinnaird* (1805),

Argument. 6 East 188, 193; *Regina v. Bedingfield* (1879), 14 Cox 341; *Regina v. McMahon* (1889), 18 O. R. 502; *Regina v. Goddard* (1882), 15 Cox 7; *Regina v. Edwards* (1872), 12 Cox 230; Roscoe's Criminal Evidence, 12th ed., p. 22.

J. R. Cartwright, Q.C., for the Crown, contended that the question was whether, under all the circumstances, it was reasonable for the woman to defer the complaint as she did; that she was not confined to one complaint; that though not part of the *res gestæ*, the evidence was admissible to confirm the prosecution on the cases cited above.

June 22nd, 1899. BOYD, C.:—

Regina v. Lillyman, [1896] 2 Q. B. 167, decides that evidence may be given not only that a complaint was made by a woman whose chastity has been assailed, but also that the particulars of the complaint may be stated. In that case it was on the same day and very shortly after the commission of the offence that complaint was made. Here complaint was made on the same day, but more fully afterwards on the next day, when a police inspector, having heard of the matter, called upon the prosecutrix. I should be disposed to reject this later statement as incompetent. Too great a time had elapsed, and it was not uttered as the unstudied outcome of the feelings of the woman and as speedily after the occasion as could reasonably be expected. It would not have been uttered at all (presumably) if the officer had not gone to the woman with "expectation in his eye" or interrogation on his countenance. A similar lapse of time was held a sufficient reason for excluding the details by Mr. Justice Wright in *Regina v. Rush*, 60 J. P. 777, decided after *Regina v. Lillyman*, in October, 1896.

I would answer the question submitted in the negative; but there is not enough before us to shew that an improper result was reached in the jury convicting the prisoners of indecent assault.

ROBERTSON, J. :—

Judgment.

Robertson, J.

After due consideration, I am of opinion that the evidence objected to was not properly received on the charge of rape, which was the case presented, and it is clear that the jury did not give to it any consideration; but the case reserved admits, as settled by the counsel for the Crown and the counsel for the prisoners, and, as I think, properly, that there was ample evidence to warrant the jury in finding the prisoners guilty of an indecent assault. That verdict should stand, but the question put by the case should be answered in the negative.

A. H. F. L.

SWAIZIE V. SWAIZIE.

Foreign Judgment—Action on—Alimony—Defences.

The courts in this Province will not aid in giving force to a foreign judgment for alimony based on grounds which would not support such a judgment here.

THIS was an action on a foreign judgment for \$800, obtained under the circumstances set out in his judgment by ROBERTSON, J., by whom the action was tried at Welland, on March 6th, 1899. Statement.

W. M. German, for the plaintiff.

J. C. Ryckert, for the defendant.

The following cases were cited: *Tilton v. McKay* (1874), 24 C. P. 94; *McPherson v. McMillan* (1846), 3 Q. B. 30; *Manning v. Thompson* (1867), 17 C. P. 606; *Godard v. Gray* (1871), L. R. 6 Q. B. 139; *Meyer v. Ralli* (1876), L. R. 1 C. P. 358; *Trafford v. Blanc* (1887), 36 Ch. D. 600; *Nouvion v. Freeman* (1889), 15 App. Cas. 1; *Herman on Estoppel*, p. 192.

Judgment. June 27th, 1899. ROBERTSON, J.:—

Robertson, J.

This is an action tried before me at Welland on a foreign judgment recovered by a married woman, the wife of the defendant, against him, in the Superior Court of Milwaukee county, in the State of Wisconsin, for the sum of \$800. The parties are both British subjects, born in Canada, and married here in July, 1881, and lived together as man and wife until May, 1892, when he went to the State of Wisconsin to look for employment, to which place his wife followed him in January, 1893, and they there lived together until 1896, when she, owing to domestic difficulties, left his home, bed and board. There is no evidence or allegation as to the particular cause for her so doing, but, afterwards, the husband, although not an American citizen, brought an action against her in the aforesaid Superior Court for divorce, the grounds alleged being "adultery and cruel and inhuman treatment of the husband by the wife." The issue of adultery in due course was tried by a jury and found in favour of the wife; the issue of cruel and inhuman treatment was tried by the Court and found in favour of the husband, and that such cruel and inhuman treatment had existed for a period of more than three years prior to the beginning of the action. The Court took cognizance of the fact and found that the husband is the owner of real property in the Province of Ontario, Canada, of the probable value of \$2,400; that the parties have one child of tender years, Emma Swaizie, at the time of the beginning of this action eight years of age; that the mother is the fit and proper person to have the care and custody of the child, and that the husband and father of the child is entitled to have access to her with reasonable frequency, etc. Then the conclusions of law come to be as follows: 1st. That the plaintiff (the husband) is entitled to divorce from the defendant from the bonds of matrimony on the ground of cruel and inhuman treatment, as prayed for in the complaint. 2nd. That the defendant (the wife) is entitled to an allowance

in lieu of alimony, out of the estate of the husband of Judgment.
\$800, to be paid forthwith, which shall be a full and final Robertson, J.
division and distribution of the estate, both real and
personal of the plaintiff (the husband) in favour of the defen-
dant (the wife) and in full and in lieu of all taxable costs,
etc., in that action except as to those theretofore allowed
and paid by the then plaintiff (the husband). 3rd. That
the defendant, Alice B. Swaizie, be awarded the care of the
child Emma, and that plaintiff have full and free access
and permission to see and visit the child with reasonable
frequency and at reasonable times and places.

The wife, who is the now plaintiff, relies on this Court
to recover on the said judgment, and to have it declared
and adjudged that the said sum of \$800 is a lien and charge
against the lands and premises of the defendant referred
to in the said judgment being the south part of the north
half of lot 33, in the 5th concession of the township of
Wainfleet in the county of Welland, containing fifty acres
more or less, and also five acres part of the north half of
said lot, of which the defendant is the owner in fee simple.

The defendant sets up no less than sixteen separate de-
fences, and that one urged with much force is, that the
Court in Wisconsin assumed a jurisdiction over the lands
and property of this defendant in this Province, which it
had not, and I think that is sufficient to defeat the
plaintiff's claim.

It is apparent that the sum of \$800 for which the Court
gave this plaintiff judgment is as declared by the judgment
"as a full and final division and distribution of the estate
both real and personal of the plaintiff (that is, the defen-
dant in this action) in favour of the defendant (the plaintiff
in this action) and in full and in lieu of alimony, etc.
And by reference to said judgment it will be seen that the
Court has filed its 'findings whereon judgment is ordered,
and such findings being produced under the seal of
the Court, it appears that the Court found that the
plaintiff (i.e., this defendant), the husband, is the owner of
real property in the Province of Ontario, Canada, of the

Judgment. probable value of \$2,400," and in "The Conclusions of Robertson, J. Law" on such findings, the Court holds "that the defendant, Alice Swaizie (this plaintiff), is entitled to an allowance in lieu of alimony out of the estate of this defendant of \$800," etc., so that the Court undertook to deal with this defendant's lands in this country in the same manner as it could had such lands been in Wisconsin. I think there is no difficulty in holding that the Courts of this country cannot aid in giving force to a foreign judgment based on such grounds. According to the judgment, so far, at all events, as the law of Wisconsin is concerned, this man and this woman are no longer husband and wife, and any lands or property which he may own in Wisconsin no doubt is bound by that decree or judgment, but when it is brought to this country to be enforced against his lands here, I think one step too many has been taken.

Now, if the action in Wisconsin had been brought by the wife to recover alimony, no action being brought by the husband for divorce, and had she recovered \$800 as and for alimony only, according to the law of Wisconsin, it does not follow that such would be conclusive in evidence sufficient to entitle her to recover a judgment upon it here. Certainly the plaintiff would have to sue in our Courts, and if it did not appear on the face of the exemplification of the judgment what formed the basis of it, it would be presumed that it was for, and would be treated as a debt, and upon proving the judgment here, the plaintiff would have made out a *prima facie* case; but defendant could plead the facts, that is, that the action in which the judgment was recovered was brought to have it declared that the plaintiff was entitled to alimony, etc., and that the plaintiff was not so entitled; so that it would then be open to defendant to shew the same defence as he would be entitled to, had the original action been brought in this country, and if the plaintiff was not entitled to recover according to the laws of this country, that would be an answer to the plaintiff's claim, in the action on the foreign judgment. It would be a strange state of things

if a wife could leave her home and her husband without Judgment sufficient cause and go to the United States and there Robertson, J. recover alimony, and afterwards return to this country with the evidence of her recovery, and enforce it by an action on it.

This case presents an extraordinary state of things. Here we have the husband and wife, two British subjects, going to the United States, leaving a farm which he owned here in possession of his tenant, and fully intending to return to it; but he and his wife remaining away two or three years, have some domestic difficulty (according to the evidence in the case under consideration, she being the blameable party, owing to her cruel and inhuman treatment of her husband), and she brings an action in the foreign country for alimony and recovers, as this plaintiff recovered in Wisconsin—what would be good grounds for alimony in Wisconsin, might be no grounds at all in Ontario, and, therefore, when that foreign judgment is sued upon here, it is open to the defendant to set up that the plaintiff had not made out a case for alimony in this country, and that would be a good answer.

The result is that this plaintiff was not entitled to recover alimony, on what appears on the face of the proceedings in the Wisconsin Court, and, therefore, she is not entitled to recover in this action. I am, therefore, obliged to dismiss the action with costs.

An objection was taken by Mr. German to the reception as evidence in this case of the "judicial findings" by the learned Judge who gave the judgment in question, but, after consideration, and taking into account that these findings are referred to as the basis of the judgment, and that they appear to be a part of the judicial proceedings duly filed in Court, I think the defendant was within his right to put them in at the trial as evidence, etc.

GOODERHAM V. MOORE.

Vendor and Purchaser—Purchase Subject to Mortgage—Indemnity—Executors and Administrators—Claim on Administrator—Limitation of Actions—R. S. O. ch. 129, sec. 35.

A sale of land for \$275 on which there was a mortgage for \$1,100, the conveyance being by the ordinary short form deed, the only reference to the mortgage being in the covenant for quiet enjoyment, was, under the circumstances, held to have been a sale subject to the mortgage, against which the vendor was entitled to be indemnified by the purchasers; and the plaintiff having acquired an assignment of such right of indemnity, he was entitled to enforce it against the purchasers.

Before the commencement of an action against the purchasers one of them died, and on the plaintiff notifying the administrator of his claim, he was served with a notice under section 35 of R. S. O. ch. 129, the "Trustee Act," disputing it. An action was afterwards brought against such administrator, but, on it appearing that he was then dead, and that an administrator *de bonis non* had been appointed, an order was obtained amending the writ by substituting as defendant such last named administrator, upon whom the writ was served more than six months after the service of the notice:—

Held, that the proceedings against the defendant must be deemed to have commenced only on the service of the writ on him, and this being more than six months from the service of the notice, the plaintiff's action was barred.

Statement. THIS was an action tried before STREET, J., without a jury, at Barrie, on 18th May, 1899.

Wallace Nesbitt, for the plaintiff.

W. A. Bell, for the defendant John Moore.

Pepler, Q.C., and *J. A. McCarthy*, for the defendant Tinegate.

The facts are fully stated in the judgment.

June 14, 1899. STREET, J.:—

The facts, as I find them, were as follows:—

On the 4th September, 1890, the plaintiff sold and conveyed to one George S. Edmunds, certain lands in the county of Simcoe, and took back a mortgage to himself for \$1,500 for the purchase money. On the 16th March, 1897, there being then \$1,100 unpaid upon the principal secured by the mortgage, Edmunds conveyed his equity of

redemption in the land in question to Matthew H. Dunlop and George J. Tinegate for the consideration of \$275. This conveyance was in form an ordinary statutory conveyance of the land in question for the price of \$275. The mortgage to the plaintiff is only mentioned as an exception to the covenant for quiet possession free from encumbrances. It is plain, however, from the evidence that the sale was one of the equity of redemption at the price of \$275.

Judgment.
Street, J.

My conclusion from the evidence with regard to the contract of sale by Edmunds is this: Dunlop was Tinegate's father-in-law, and wished to settle him upon a farm and to help him to secure it. He negotiated with Edmunds in the first place for the purchase of this equity of redemption, and joined with Tinegate in the purchase with the intention of holding it as against Tinegate merely as a security for the aid he was giving to the latter in the purchase. Under these circumstances Edmunds is entitled to treat him as one of the purchasers, and to be indemnified by both of his grantees against the demands of the mortgagee.

I do not regard the form of the conveyance as being material so long as it is not inconsistent with the equity which is applied. It is plain here that the sale for \$275 was not a sale of the land free of the mortgage, but a sale of the equity of redemption subject to the mortgage, for the value of the land was about \$1,375 to \$1,400, and the mortgage was for \$1,100 with some accrued interest.

Under these circumstances it is plain that the intention of the parties was that the purchasers should pay the mortgage, not that the vendor should do so; otherwise the purchasers would be getting a farm worth \$1,375 or \$1,400 for \$275.

The equity to be applied is one which carries out what the parties intended, not what they did not intend, and requires the purchasers to indemnify the mortgagor Edmunds.

This right to indemnity has been assigned by Edmunds

Judgment. to the plaintiff, and under the cases in our courts the
Street, J. plaintiff is entitled to enforce it actively and directly against the purchasers.

There is, therefore, in my opinion, no question whatever as to the plaintiff's right to recover the amount of the mortgage personally from Tinegate; but a question arises with regard to the right to recover from the estate of the other purchaser Dunlop. He died shortly after the making of the conveyance by Edmunds to him and Tinegate, and one James Moore was appointed his administrator. The plaintiff, having obtained from Edmunds an assignment of his claim to indemnity against the deceased and Tinegate, sent in a claim to the administrator for the amount of the mortgage money, with an affidavit setting forth the grounds of his claim. The administrator thereupon served the plaintiff with a notice in the following words:—

"To George Gooderham, Toronto:

"In the estate of Matthew Dunlop, late of the township of Tossorontio, in the county of Simcoe, deceased.

"Take notice that the administrator of the estate of said Matthew Dunlop, deceased, disputes your claim filed herein.

"This notice is given pursuant to sec. 35 of R. S. O. 1897, ch. 129, and said administrator will avail himself of the provisions of said section.

"Dated at Alliston, 30th June, A. D. 1898.

"(Signed) FISHER & BELL,

"Solicitors for James Moore,

"Administrator of said estate."

This notice was served on the plaintiff on the 4th July, 1898, and on 24th December, 1898, he began the present action against James Moore, administrator of the estate of Matthew Dunlop, deceased, and George J. Tinegate. Before this writ was issued, however, James Moore had died, viz., on 30th November, 1898. On 11th January, 1899, the present defendant John Moore, was appointed by the proper surrogate court to be administrator *de bonis non*

of the estate of Matthew Dunlop. On 14th February, 1899, the plaintiff obtained an order in this cause allowing him to substitute John Moore in his capacity of administrator *de bonis non* as a defendant in place of James Moore, administrator of the estate of Matthew Dunlop, deceased, and the writ in this action was amended accordingly on 16th February, 1899, and served on the defendant John Moore, on 18th February, 1899.

Judgment.
Street, J.

The defendant John Moore, has set up, amongst other defences, the provisions of the 35th sec. of R. S. O., ch. 129, as an answer to the action so far as he and the estate of the deceased Matthew Dunlop are concerned.

That section is as follows:—

“35. In case the executor or administrator gives notice in writing referring to this section and of his intention to avail himself thereof to any creditor or other person of whose claims against the estate he has notice, or to the attorney or agent of such creditor or other person, that he the executor or administrator rejects or disputes the claim, it shall be the duty of the claimant to commence his action in respect of the claim within six months after the notice is given, in case the debt or some part thereof is due at the time of the notice, or within six months from the time the debt or some part thereof falls due if no part thereof is due at the time of the notice, and in default the claim shall be forever barred; provided always that in case the claimant shall be nonsuited at the trial the claimant, or his executors or administrators, may commence a new action within a further period of one month from the time of the nonsuit.”

It is plain from the dates I have given that the plaintiff has not brought his action against either the original administrator or the administrator *de bonis non* within the period fixed by this section. The action was a nullity so far as the original administrator, James Moore, was concerned, because he had been dead for several weeks at the time the writ in which his name appeared as a defendant was issued; and the proceedings are to be taken to have

Judgment. been begun as against the present defendant John Moore,
Street, J. only on 18th February, 1899, when he was served: Rule 206, sub-sec. (4).

The hardship upon the plaintiff of holding his claim against the estate of Dunlop to have been barred under these circumstances is unquestionable; but I have been unable to find any sound reason, or any sufficient authority, for holding that the statute should not be literally applied. I gather from its surroundings that the object of it is to expedite the winding-up of the estates of deceased persons by affording to executors and administrators a means of determining within a reasonable time the legal validity of claims which they think should be contested. The period fixed by the statute began to run from the service of the notice, and I can see no reason for not following the rule so firmly established with regard to statutes of limitation, that having once begun to run its currency is not stayed by the death of the alleged debtor.

In the present case an administrator *de bonis non* was appointed on 11th January, 1899, and the amended statement of claim was not served until 18th February, 1899, so that even if the period during which no personal representative existed could be added to the six months allowed by the statute—and I am not aware of any authority for adding it—the plaintiff would still be too late.

Where the language of a statute is clear, it is the duty of courts to give to it the meaning which it bears.

Lord Westbury says in *Ex p. Vicar and Churchwardens of St. Sepulchre's* (1863), 33 L. J. Ch. 372, at p. 375, that the established rules of interpretation “no doubt admit of your putting a secondary meaning upon words, where the ordinary and primary signification would lead to some absurdity, or some impossibility. But where the conclusion is merely that there is a *casus omissus*, for which the Legislature has not provided, to alter the ordinary rules of interpretation, upon the principle of a duty due to abstract justice, is simply to legislate, and not to interpret.”

In *Smith v. Rines* (1836), 2 Sumn. 338, at p. 354, Story, J., Judgment.
says: "It is not for Courts of Justice, *proprio Marte* to pro- Street, J.
vide for all the defects or mischiefs of imperfect legislation."

"The idea that implied and equitable exceptions, which the Legislature has not made, are to be engrafted by the Courts on a statute of limitations is now generally abandoned": Sedgwick on Statutory and Constitutional Law, p. 277.

There should be judgment, therefore, for the plaintiff against the defendant George J. Tinegate, for \$1,100, with interest at six per cent. from 4th September, 1897, and costs of the action; and the action should be dismissed with costs as against the defendant Moore.

G. F. H.

SNIDER V. MCKELVEY.

Contract—Agreement not to Practice Medicine—Breach of—Right to Damages and Injunction.

By an agreement under seal the defendant, a physician and surgeon, sold his land and premises and his medical practice in a village, with the good-will thereof, to the plaintiff for \$2,100, and bound himself in the sum of \$400 to be paid to the plaintiff in case he should set up or locate himself within five years within a radius of five miles of the village:—
Held, the plaintiff was entitled to damages for breach of the agreement and also to an injunction restraining him from further breaches.

THIS was an action tried before ROBERTSON, J., at the Statement.
Goderich non-jury sittings, 20th May, 1899.

The action was brought to restrain the defendant from practising his profession as a doctor of medicine and surgeon in or within a radius of five miles of the village of Brussels in the county of Huron; and for damages for breach of an agreement not to practise.

The action was based on an agreement under seal entered into between the defendant, of the first part, and plaintiff

Statement. of the second part, which bore date 7th December, 1897, and whereby the party of the first part agreed with the party of the second part to sell his lands and premises in Brussels to the party of second part, and to sell his medical practice in the said village, with the good-will of said practice, for the sum of \$2,100. The agreement also contained the following clause: "The said party of the first part agrees that on 13th December, 1897, and on the conditions of a certain agreement for the sale and purchase of said lands and premises being fulfilled by the party of the second part, he will deliver, hand over and transfer the said medical practice and good-will thereof unto the said party of the second part. * * And the said party of the first part binds himself in the sum of \$400, to be paid to the party of the second part, in case the said party of the first part shall set up or locate himself in the practise of medicine or surgery within the space of five years from the date hereof, within a radius of five miles from the said village of Brussels."

It was admitted at the trial that defendant had practised within the radius mentioned, contrary to the said agreement; and that, if plaintiff was entitled to recover damages as well as to an injunction to restrain defendant from further breach, that \$100 should be found as the damages to be paid by defendant to plaintiff.

Garrow, Q.C., for the defendant, said that the defendant was willing to pay \$400, the amount mentioned in the agreement and costs of the action up to the date of pleading, or to submit to a perpetual injunction for the term mentioned in the agreement; but he contended that the plaintiff was not entitled to damages, and also to an injunction.

Sinclair, for the plaintiff, declined the offer, and contended that the plaintiff was entitled to both; and referred to *Mossop v. Mason* (1871), 18 Gr. 453; *National Provincial Bank of England v. Marshall* (1888), 40 Ch. D. 112. That the defendant admitted the breach; and he

contended that the sum mentioned was a penalty and not liquidated damages: First, because the language indicated a penalty; second, the intention was not that defendant could commit a breach, pay the \$400, and resume practice; the intention was that defendant should be liable for such damages as plaintiff suffered from the breach, as well as to an injunction to restrain from further breaches; third, the word "penalty" does not fix the meaning to be such. He also referred to Kerr on Injunctions (Blackstone ed.), pp. 456, 457. Argument.

The practice of the defendant, of which the good-will was sold, was represented by the defendant to be worth from \$2,000 to \$2,500 per annum. It was a bargain not only to sell the land and premises, where the defendant carried on this practice, but the practice, and the good-will of it, as well; and it was expressly stated in the agreement, that the consideration mentioned as being for the land, expressly intended the good-will. He also referred to *Protector Endowment Loan and Annuity Co. v. Grice* (1880), 5 Q. B. D. 592; *Lea v. Whitaker* (1872), L. R. 8 C. P. 70; Ontario Judicature Act, sec. 58, sub-sec. 10.

Garrow, Q.C., contra. It makes no difference whether the \$400 mentioned in the agreement is a penalty or liquidated damages, the remedy is single. The plaintiff cannot have both. When the parties have agreed on the amount the plaintiff is confined to that, or to an injunction; or, if it is a penal sum, he may have nominal damages, and an injunction, but not substantial damages and an injunction: *Sainter v. Ferguson* (1849), 1 MacN. & G. 286; *Strickland v. Williams*, [1899] 1 Q. B. 382; *Wallis v. Smith* (1882), 21 Ch. D. 243; *Willson v. Love*, [1896] 1 Q. B. 626; *Lord Elphinstone v. Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332; *Carnes v. Nesbitt* (1862), 7 H. & N. 778; *Mayall v. Higbey* (1862), 1 H. & C. 148, 152; *sed vide Howard v. Woodward* (1864), 10 Jur. N. S. 1123; *Fox v. Scard* (1863), 33 Beav. 327.

Judgment. July 14th, 1899. ROBERTSON, J. :—

Robertson, J.

I have fully considered this case, and after referring to all the cases cited by the respective counsel as well as other cases and text books not cited, I have come to the conclusion, although not without some doubt, that the plaintiff's contention is the correct one, under the circumstances admitted before me at the trial, and upon the agreement entered into between the parties. There is no doubt what the real agreement was. It is in writing, and any phraseology, which by itself might be considered somewhat ambiguous, the admissions of counsel make its meaning to my mind perfectly clear. The important feature is, that there was an actual sale of the good-will of the defendant's practice to the plaintiff; that the \$2,100 mentioned as the consideration money to be paid for the lands and premises sold, included the consideration to be paid for the good-will; in fact, it is what in common parlance is called a "lump bargain." For the two things together \$2,100 was paid, and there was an actual conveyance of both; so that, when the defendant committed a breach of the agreement by practising within the prescribed limit, he was amenable to the charge of having committed a fraud; he, in fact, was taking from the plaintiff, by surreptitious means, that which belonged to the plaintiff, and which the plaintiff had paid him (defendant) a valuable consideration for; and according to statement of counsel, not contradicted, this was going on in a clandestine way for some time before the plaintiff became aware of the fact.

This case is not on all fours with the cases cited by Mr. Garrow, with the applicability of which, I confess, at first glance, I was much impressed; but it appears to me *Mossop v. Mason* (1871), 18 Gr. (in appeal) 453, which was decided in 1871, by the unanimous judgment of the Court of Appeal as then constituted (Draper, C. J., Richards, C. J., Hagarty, C. J., Wilson, J., Mowat, V.-C., and Galt, J.) is almost identical. That case was decided

after our Act, 28 Vict. ch. 17, sec. 3, which is the same as Judgment.
sec. 58, sub-sec. 10, Ontario Judicature Act, which author- Robertson, J.
izes damages to the party injured, if the Court thinks fit,
either in addition to or in substitution for an injunction;
and this, therefore, is a clear authority in support of
the plaintiff's contention; and it appears to me that it
governs this case. There there was an injunction and a
reference to the Master to ascertain the damages.

In *National Provincial Bank of England v. Marshall*
(1888), 40 Ch. D. 112, there was a bond on the part of an
employee of the plaintiff in the penal sum of £1,000, the
condition of which was that he should pay the plaintiff
£1,000 as liquidated damages, in case he should at any time
within two years after his leaving the service of the plain-
tiff accept any employment in any other bank within two
miles of the plaintiff's bank. The defendant resigned his
employment in plaintiff's bank and immediately entered
into the service of a rival bank in same town. The plain-
tiff brought an action claiming an injunction to restrain
the defendant from holding employment in any rival bank.
The defendant was willing and offered to pay the penal
sum of £1,000; but the Court held that the defendant could
not satisfy his obligation by paying the penal sum, but
there was an agreement between the parties to be implied
from the bond that the defendant should not enter into the
service of a rival bank, which could be enforced in equity.

There was a distinction between that and the one now
under consideration; not so much, perhaps, from the exact
words used, but from the nature of the circumstances of
the two cases. In the case now under consideration, the
damages for each breach could be estimated, and there
would be a breach on the occasion of every time the defen-
dant practised; and each act of practice would be a sepa-
rate breach; and, in my judgment, the plaintiff is entitled
not only to the damages sustained by him for each breach,
but to an injunction to restrain from further breaches.
In the case of the bank clerk there could be but one
breach, and the moment that breach was committed, the

Judgment. plaintiff would be entitled to an injunction; and so it may
Robertson, J. be said of the case of the medical practitioner; but it goes further, because each act of practice is a breach, and each breach causes damage to the plaintiff, and it is not reasonable to suppose that the plaintiff could obtain the order of the Court restraining the defendant until after some material damage had been done by the breach; and the plaintiff would therefore be entitled not only to damages not to exceed \$400, but to an injunction also. The real object of the agreement between the parties in this action was to purchase and sell the good-will of the practice of the defendant's business, as well as to purchase and sell the premises occupied by defendant while carrying on such practice. It was represented that the practice was worth from \$2,000 to \$2,500, and the real intention of the parties, I think is clearly made out from the agreement to be a sale and purchase of the defendant's good-will in that practice; and it is not contended that if the good-will had not been purchased, the property would notwithstanding have been bought.

Now the cases cited by Mr. Garrow are all distinguishable from this one. In no one of them was there a sale of the good-will of any business; and that, to my mind, makes all the difference, and shews the justness of the rule in these cases where the party was put to his election.

In *Sainter v. Ferguson* (1849), 1 MacN. & G. 286, the plaintiff was a surgeon, and entered into an agreement in writing with the defendant, in consideration that he (the plaintiff) would engage the defendant as assistant to the plaintiff as a surgeon, he (the defendant) promised the plaintiff that he, the defendant, would not at any time practice in his own name or in the name or names of any other person or persons as surgeon at Macclesfield or within seven miles thereof under a penalty of £500; and the plaintiff in consideration thereof agreed to engage the defendant as an assistant surgeon and on the terms aforesaid. This was in April, 1848. The defendant continued in the service of the plaintiff until August of that year, when, for

reasons not disputed as amply sufficient, the plaintiff discharged him. The defendant thereupon commenced practice in Macclesfield and the plaintiff filed his bill for an injunction. An application for an injunction was made during long vacation, but this was refused on the ground that the plaintiff's equity depended on the legal effect to be given to the agreement between the parties, but the motion was ordered to stand over with liberty to the plaintiff to bring an action such as he might be advised. Subsequently the plaintiff brought an action against the defendant in assumpsit, and the plaintiff obtained a verdict for £500, and subsequently judgment for £500 damages and for costs was signed. The defendant having become bankrupt, the plaintiff proved for the amount of the costs only, and afterwards applied to the Vice-Chancellor for an injunction which was granted on condition that the plaintiff should not prove for the £500. The defendant then moved to discharge this order; and it was held that as the court of law had determined that the word "penalty" in the agreement meant liquidated damages, therefore there was no right of action now remaining.

Judgment.

Robertson, J.

The Lord Chancellor who heard the appeal set aside the Vice-Chancellor's order, holding that the court of law construed the agreement to mean that the defendant should not practise, or if he did, he must pay £500; but he said if the plaintiff had seen the difficulty which had since arisen, he might have put the matter so as to have had the option left to him either of exercising his legal right or his equitable remedy, and not to have been precluded from the alternative which before the action he had, either to ask for an injunction or to obtain compensation at law.

Now, all that this case decides is that you cannot have both a remedy at law and one in equity enforced. That was in 1849, before Lord Cairn's Act; but, even had it been after, I can quite understand why in a case such as that was the plaintiff was not entitled to both the full penalty in money and an injunction also. There was no pecuniary consideration paid for any good-will of a business

Judgment. which at the time had no existence. The defendant in this Robertson, J. case did not sell or dispose of any right which had any existence at the time; he bound himself in a penalty not to practise in Macclesfield if the plaintiff would take him as an assistant in his business. And one can easily see the reason for that. The plaintiff had made the business; the defendant was a stranger and, for all that appears, had no business connection whatever, but owing to his connection about to be formed with the plaintiff, he would have many opportunities of ingratiating himself in the good opinion of the plaintiff's patients, and ultimately supplanting the plaintiff in that very practice which in fact belonged to the plaintiff; so it was agreed between them that he (the defendant) would not practise in that locality after he had left the employment of the plaintiff, or in case he did so he would forfeit and pay £500. At law he could and did recover judgment for that sum; it was not a penalty, but a sum agreed to be paid by him if he broke the agreement. The plaintiff clearly, according to the language of the Lord Chancellor, had a remedy in equity to restrain the further practising, but he could not have both the sum agreed to be paid for practising and restrain the defendant from doing that which he had paid for, because the judgment for the damages put an end to the agreement, and there was no agreement in existence at the time the order was made by the Vice-Chancellor granting the injunction. So that this case is not an authority in favour of the defendant in the case now under consideration.

Strickland v. Williams, [1899] 1 Q. B. 382, was on a bond for £100 given by the defendant. The condition was that if the defendant should, in obedience to a perpetual injunction, refrain from trespassing on the plaintiff's land, or inciting others to do so, the obligation should be void. The defendant committed a breach of the injunction. Held, that the condition of the bond depended upon one event only, viz., a breach of the injunction, and that the amount secured by the bond was liquidated.

Willson v. Love, [1896] 1 Q. B. 626. A lease of a farm

contained a covenant by lessee not to sell hay or straw off Judgment. the premises during the last twelve months of the term, Robertson, J. but to consume same on the premises; and provided that an additional rent of £3 per ton should be payable by way of penalty for every ton of hay or straw so sold; and it appeared that there was a substantial difference between the manurial value of hay and that of straw. Held, that sums so made payable were penalties and not liquidated damages. See Lord Esher's judgment in regard to "penalty," and the differences among the judges as to, at p. 630.

And so it may be said of all the other cases cited by Mr. Garrow. They are distinguishable from this case, and cannot, in my judgment, overrule the decisions of our own Court of Appeal in *Mossop v. Mason*.

I therefore find for the plaintiff, and as agreed at the trial, direct that judgment be entered for the plaintiff for \$100 damages for the breaches of the agreement by the defendant in having carried on his practice in and within a radius of five miles of Brussels, after having disposed of the good-will of that business for good consideration to the plaintiff; and let an order go restraining the defendant from further prosecuting said practice within the limits aforesaid for the residue of the time agreed upon between him and the plaintiff; and the defendant should pay the plaintiff the full costs of the action.

G. F. H.

THE BANK OF HAMILTON V. THE IMPERIAL BANK.

*Banks and Banking—Certified Cheque—Alteration of—Clearing House—
Notice—Liability.*

A person having \$10.25 to his credit at the Bank of Hamilton in Toronto, drew a cheque for \$5, which he presented at that bank and had it certified to. The cheque had no figures before the dollar mark, and on the line for the written amount the word "five" was written, a long space being left between it and the word "dollar." He then altered the cheque by writing the figures "500" after the dollar mark and the word "hundred" after the word five, and taking the cheque so altered, deposited it at the Imperial Bank in Toronto, and opened an account there getting three cheques on that bank marked good, namely, for \$300, \$150, and \$50, drawing out the amount of the \$300 cheque, and negotiating the other two. The altered cheque was sent by the Imperial Bank, Toronto, to the Clearing House there, and under the system in vogue, it was charged against the Bank of Hamilton. On the following morning, on the Bank of Hamilton discovering that no cheque for \$500 had been debited to the drawer's account and that a forgery had been committed, immediately notified the Imperial Bank, and demanded repayment of \$495, being the difference between the \$500 and the \$5 which had been debited to the drawer. Under the system in force the forgery would not be discovered until the following morning after the cheque was received from the Clearing House, but there was evidence that under a different system it might have been discovered sooner:—

Held, that the plaintiff was entitled to recover.

Statement. THIS was an action tried before MACMAHON, J., at Toronto, without a jury, on the 10th March, 1899.

Osler, Q.C., and *A. M. Stuart*, for the plaintiffs.

Lash, Q.C., and *Kappele*, for the defendants.

Subsequently the learned Judge delivered the following judgment in which the facts are stated.

July 15, 1899. MACMAHON, J.:—

The action is brought to recover from the defendants the sum of \$495 paid by the plaintiffs to the defendants under the following circumstances: One Carl Bauer had an account with the Bank of Hamilton in Toronto, and on the 25th January, 1897, there was to his credit the sum of

\$10.23. On that day he drew a cheque which, according to his evidence taken under commission at Kingston, was in the following form :—

Judgment.
MacMahon,
J.

"No. 136. Toronto, Ont., Jan. 25, 1897.

To the Bank of Hamilton.

Pay to Cash	or bearer \$
Five	/100 Dollars
(Signed)	CARL BAUER."

The cheque was presented by Bauer to the ledger keeper and was by him debited to Bauer's account, and who then certified the same by writing the folio number of Bauer's account in the ledger across the face of the cheque, and stamping it with a rubber stamp, which made an impression in red ink as follows: "Bank of Hamilton, Toronto. Entered January 25, 1897." He handed it back to Bauer, who took it away with him from the bank. There being no figures after the dollar mark, and a considerable space on the fourth line between the words "Five" and "dollars," Bauer fraudulently put the figures "500" after the dollar mark, and wrote the words "hundred and" after the word "Five"; and on the following day (the 26th January), taking the cheque so altered to the agency of the Imperial Bank at the corner of Yonge and Queen streets, deposited it to the credit of an account which he there opened. He at once drew against the account three cheques, one for \$300, one for \$150, and another for \$35, all of which he had marked "good" by the ledger keeper, and got the cash at that agency for the \$300 cheque; the other two cheques he negotiated.

Bauer had been for some time employed in Toronto as agent for the Metropolitan Life Insurance Company and, being known at the different banks, no suspicion was entertained as to the genuineness of the cheque at the time he deposited it in the Imperial Bank. He was subsequently prosecuted for forgery in altering the certified cheque, and sentenced to imprisonment in the Kingston Penitentiary.

Judgment.
MacMahon,
J.

The cheque so deposited with the Imperial Bank was, on the morning of the 27th January, sent by that bank with the other cheques drawn upon the Bank of Hamilton, and also with the bills of that bank that had been deposited on the previous day in the Imperial Bank, presented at the Clearing House, which was established to facilitate the exchange of money and cheques between the different banks, and of which all the chartered banks in Toronto are members. A clerk from each of the banks going to the Clearing House at ten o'clock in the morning, where the balances between the different banks are struck by the manager, who in turn is a clerk from one of the banks.

The rules of the Clearing House having any bearing on the case are: Numbers 10, 13 and 14. Rule 10 reads: "The hour for making exchanges at the Clearing House shall be 10 o'clock a.m. precisely, except on Saturday, when it shall be 9.50 o'clock a.m. precisely. All debit balances must be paid into the clearing bank between 12 and 12.30 of the same day, and between 12.30 and 1 o'clock p.m. the creditor banks shall receive from the clearing bank the balances due to them respectively, provided that the balances due from the debtor banks shall then have been paid."

"13. Errors in the exchanges and claims arising from the return of items, or from any other cause, are to be adjusted directly between the banks interested, and all such errors and claims, shall be paid in legal tenders immediately on demand of the returning bank; but in case of nonpayment, the manager of the Clearing House shall, on notice from the bank making the claim, deduct the amount thereof from the settling sheets of the banks concerned, and readjust the clearing statements and declare the correct balances in conformity with the changes so made, provided that such notice shall be given to the Clearing House manager before 12 o'clock noon, after which hour any differences must be adjusted without reference to the Clearing House."

"14. It is expressly agreed that nothing herein contained shall deprive a bank of any right it may or might have otherwise than under the foregoing rule to return or object to any item, which right is to remain as if these rules had not been made; and the Clearing House must not be used as a means of obtaining payment of disputed items or items objected to for any reason, it being expressly declared that any bank may return any item, or refuse to credit any sum, which it would be free to return, or to refuse to credit had the exchange been made directly between the banks concerned, instead of through the Clearing House."

Judgment.

MacMahon,
J.

Section 72 of the Bills of Exchange Act defines a cheque "as a bill of exchange drawn on a bank payable on demand." This definition is amplified by Lord Blackburn in *McLean v. Clydesdale Banking Co.* (1883), 9 App. Cas. at p. 107, who defines a cheque as an unconditional order in writing addressed to the banker requiring him to pay a sum certain in money, at a fixed, or determinable future time, that is to say, on presentation.

A cheque is to be governed by the provisions of the Act applicable to a bill of exchange payable on demand, subject to the exceptions mentioned in sections 73, 74 and 75, which have no bearing on the present case.

In *Gaden v. Newfoundland Savings Bank*, [1899] A. C. 281, Sir Henry Strong, in delivering the opinion of the Judicial Committee, at pp. 285-6, said: "A cheque certified before delivery is subject, as regards its subsequent negotiation, to all the rules applicable to uncertified cheques. The only effect of the certifying is to give the cheque additional currency by shewing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn."

Where the drawee bank certifies a cheque, as Bauer's was in the present case, it is a representation to the transferee or endorsee that the bank has funds of the drawer in its hands applicable to the payment of that particular

Judgment. cheque, and from that moment it is an obligation of the
MacMahon, bank to the holder of the cheque so marked or certified.
J.

There is no question that the fraudulent alteration of the cheque by raising it from \$5 to \$500 constituted a forgery. And it is unquestionable that the condition of the cheque when certified by the bank afforded ample opportunity for the commission of the fraudulent alteration which Bauer made. However, under the law as now settled by the House of Lords, a drawee bank in certifying a cheque is under no duty to take precautions against fraudulent alterations in a cheque after certifying the same, any more than an acceptor of a bill of exchange is under a duty to take precautions against fraudulent alterations in a bill after acceptance: *Scholfield v. Earl of Londesborough*, [1895] 1 Q. B. 536; and [1896] A. C. 514.

The *Scholfield* case and the present case are on all fours. In the *Scholfield* case there was the genuine signature of Saunders, the drawer of the bill, and the bill was duly accepted by the drawee, the Earl of Londesborough, and it was after acceptance by him that the bill was fraudulently altered by the drawer from £500 to £3,500. In the present case Bauer drew and presented a cheque for \$5, and after it was certified by the bank and charged to his account he fraudulently altered it to \$500.

The Bank of Hamilton received from the Clearing House, at 10 o'clock on the morning of the clearing day (27th January), the bundle containing the bank bills and the uncertified and certified cheques drawn on the bank—amongst the latter being the cheque in question. At the same time the Bank of Hamilton received through the Clearing House from the other thirteen banks in Toronto the bank bills and accepted and unaccepted cheques drawn upon it.

The custom of each of the banks is, on receipt of the parcels from the different banks through the Clearing House, to at once count over, and check the cash, and for the ledger keeper to take the uncertified cheques and charge the same against the accounts of the respective

drawers thereof, providing there be to the credit of the drawers sufficient funds to meet the cheques drawn against such accounts. This custom of first dealing with the uncertified cheques is absolutely necessary for the protection of the banks, as within two hours and a half each bank must at its peril determine as to the genuineness of the signature of the drawer of every uncertified cheque drawn upon it, and also as to the state of his account in order that every rejected cheque may be returned to the clearing bank by 12.30, at which hour the credit banks are entitled to receive from the clearing bank the credit balances due to them.

Judgment.

MacMahon,
J.

With regard to certified or marked cheques, a different custom prevails. Where a cheque has been certified the drawee bank has thereby acknowledged the genuineness of the signature of the drawer. And it is the universal rule of the banks as to such cheques to hand them to a clerk, who enters them up in what is called the supplementary cash book, and on the following morning such cheques are called over from the supplementary cash book and checked with the deposit ledger. This course was pursued by the Bank of Hamilton on the morning of the 28th January, commencing about 9 o'clock and concluding about 10, when it was discovered that no cheque for \$500 had been debited to Bauer's account, and that a forgery had been committed. The Bank of Hamilton at once notified the Imperial Bank of the fact of the cheque having been fraudulently altered from \$5 to \$500, and a demand in writing was on the same day made for repayment of \$495.

Mr. Stanger, the manager of the Bank of British North America and secretary of the Clearing House, said that in the usual course, unless a forgery was apparent, it would not be discovered until the following morning after being received from the Clearing House; but he admitted there was nothing in the system of banking which would prevent the alteration from being discovered if the banks adopted a different system. The officers from a number of

Judgment. the other banks, who were called as witnesses, stated that,
MacMahon, having regard to the rules of the Clearing House and the
J. course of business, it would be impossible to discover the raising of a cheque until the following morning.

The claim of the plaintiffs against the defendants in respect of the excess of the sum appearing on the cheque over the amount at which it was certified is not in any way prejudiced by the rules of the Clearing House.

Many of the cases dealing with the question now before me for adjudication were up to the date of the judgment in the Court of Appeal in *Ryan v. Bank of Montreal* (1887), 14 A. R. 533, considered by Patterson, J.A., in his judgment in that case. And at page 559 he says: "The plaintiff lost no time in giving notice to the defendants after he knew of the forgery, but that was nearly two months after the payment of the money. But, though the delay was thus inadvertent and unavoidable, the law seems to be that it would afford an answer to the plaintiff's demand, if it prejudiced the defendants in their relation to other parties to the bill."

While citing the above paragraph, I do not lose sight of the fact that there was no actual genuine party on the bill in that case against whom the defendants could have recourse, and consequently no remedy was lost by them through the delay of the plaintiff in discovering the forgery.

The head note to the case of the *London and River Plate Bank, Limited v. Bank of Liverpool, Limited*, [1896] 1 Q. B. 7, reads: "When a bill becomes due and is presented for payment, and is paid in good faith and the money is received in good faith, if such an interval of time has elapsed that the position of the holder may have been altered, the money so paid cannot be recovered from the holder, although endorsements on the bill subsequently prove to be forgeries."

The draft in that case was paid on the 19th August, 1893, and it was not until some months afterwards that the endorsements on the draft,—and upon the strength of which it was paid by the plaintiffs to the defendants,—were discovered to be forgeries. The defendants became pos-

essed of the draft in good faith and were as ignorant as the plaintiffs that the endorsements were forgeries.

Judgment.
MacMahon,
J.

Mr. Justice Mathew, in giving judgment, said, at p. 11 : "In *Cocks v. Masterman* (1829), 9 B. & C. 902, the simple rule was laid down in clear language for the first time that when a bill becomes due, and is presented for payment the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at once, it may be the money can be recovered back ; but if it be not, and the money is paid in good faith and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indispensable for the conduct of business."

Mr. Justice Bailey, who delivered the judgment of the Court in *Cocks v. Masterman*, 9 B. & C., said, at p. 909 : "The holder, indeed, is not bound by law (if the bill be dishonoured by the acceptor) to take any steps against the other parties to the bill till the day after it is dishonoured. But he is entitled to do so, if he thinks fit, and the parties who pay the bill ought not by their negligence to deprive the holder of any right or privilege."

There was no negligence on the part of the plaintiffs, as the course they pursued in regard to the certified cheques was the one universally adopted by the banks since the establishment of the Clearing House, and the holders of the cheque—the Imperial Bank—were not deprived of any rights, nor was its position altered by reason of the notice of the forgery not being given until the following day, as it had no remedy against any one but Bauer, and the remedy against him always continued to exist. Bauer's cheque was payable to bearer, and was not endorsed even by him. He obtained \$500 from the Imperial Bank by means of the forged cheque, and recourse against him by that bank for the full amount of the bill was never lost.

There must be judgment for the plaintiffs for \$495 and costs.

[DIVISIONAL COURT.]

RE YOUNG AND TOWNSHIP OF BINBROOK.

Municipal Corporations—By-law—Submission to Electors—Voters' Lists—Omission of Classes of Voters—Irregularity—Saving Clause.

Farmers' sons and income voters should be included in the voters' lists prepared for the taking of the vote upon a municipal by-law prohibiting the sale of intoxicating liquors in a township under sec. 141 of the Liquor License Act, R. S. O. ch. 245, and their omission is an irregularity.

In re Craft and Town of Peterborough (1890), 17 A. R. 21, and *In re Pounder and Village of Winchester* (1892), 19 A. R. 684, followed.

Where all such votes had been omitted from the list by the clerk of the township under the honest supposition that they should not have been placed thereon, but the number of votes so left off was less than the majority by which the by-law was carried, and there was nothing to shew that the result of the error had in any way affected the votes that were cast, or that persons who would otherwise have voted had abstained from doing so on account of the error, or that there was any other good ground for believing that the result might probably have been different had the list been properly prepared, and it appearing that the election had been conducted in accordance with the principles laid down in the Municipal Act, in that the directions of the Act had not been intentionally violated, the Court refused to quash the by-law. *Woodward v. Sarsons* (1875), 10 C. P. 733, followed.

Statement.

THIS was an appeal by Robert Young from an order of ROSE, J., made in the Weekly Court on the 13th April, 1899, dismissing an application by the appellant to quash by-law No. 321 of the council of the township of Binbrook.

The by-law in question was one prohibiting the sale of intoxicating liquors in the township, under the provisions of sec. 141* of the Liquor License Act, R. S. O. ch. 245, and was submitted to the vote required by that section, on the 16th January, 1899, and a majority of 98 votes appeared at the close of the poll in favour of the by-law.

*141.—(1) The council of every township * * may pass by-laws for prohibiting the sale by retail of spirituous, fermented or other manufactured liquors, in any tavern, inn or other house or place of public entertainment, and for prohibiting the sale thereof, except by wholesale, in shops and places other than houses of public entertainment: Provided that the by-law, before the final passing thereof, has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act.

The objection to the validity of the by-law was that the names of some 82 persons entitled to vote upon the question submitted were omitted from the lists furnished to the deputy returning officers, and that these persons had no opportunity of voting. Statement.

The clerk who prepared the lists of voters for use upon the occasion was under the impression that only those persons were entitled to vote who would be entitled to vote upon money by-laws, and he therefore left out all farmers' sons and income voters.

The number of persons entitled to vote at municipal elections was 490, made up as follows:

Owners and tenants.....	410
Farmers' sons.....	78
Income voters.....	2
	<hr/>
	490

Of these only 409 names appeared upon the lists furnished by the clerk to the deputy returning officers for the purpose of taking the vote, being the owners and tenants, less one name struck off by the County Court Judge.

Out of the 409 persons on the list, only 272 actually voted, and of these, 185 votes were cast in favour of the by-law and 87 against it, leaving a majority of 98 in favour of it.

The appeal from the order dismissing the motion was heard by a Divisional Court composed of ARMOUR, C. J., and STREET, J., on the 8th June, 1899.

Haverson, for the appellant. It cannot be said that the by-law was submitted to the electors: *In re Croft and Town of Peterborough* (1889-90), 17 O. R. 522, 17 A. R. 21; *In re Pounder and Village of Winchester* (1892), 19 A. R. 684. The omission of 80 names from the lists was more than an irregularity, but, even if it was merely an irregularity, it affected the result: see *The Hackney Case* (1874), 2 O'M. & H. 77, *per* Grove, J. All that I have to shew is

Argument. that it might have affected the result of the election; some of the persons who did not vote, although they might have, may have been prevented from voting against the by-law by the so-called irregularity. *Woodward v. Sarsons* (1875), L.R. 10 C.P. 733, is nothing like this case.

J. J. Maclaren, Q. C., and *E. F. Lazier*, for the corporation. The majority was 98, and at the most only 84 voters were left off the lists; so the result was not affected. It is not obligatory upon the Court to quash a by-law such as this, but discretionary: *Re Huson and Township of South Norwich* (1892), 19 A. R. 343. The illegality charged is not on the face of it. If there was a mistake, sec. 204* of the Municipal Act covers it. But there was no mistake; the remarks in the *Croft* and *Pounder* cases are *obiter*: see secs. 338, 348, 353, 354 of the Municipal Act.

September 26, 1899. The judgment of the Court was delivered by

STREET, J.:—

The first question is whether the clerk should have included the farmers' sons and income voters in the lists prepared by him for the purpose of taking the vote upon the by-law in question, or whether he was right in limiting the lists to the persons entitled to vote upon money by-laws. I cannot find that any alteration in the statutes has taken place since *In re Pounder and Village of Winchester* (1892), 19 A. R. 684, was determined, which should interfere with the authority of that decision and of the preceding case of *In re Croft and Town of Peterborough* (1890), 17 A. R. 21.

*204.—No election shall be declared invalid by reason of a non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedules to this Act, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election.

Following these cases, I think we must hold that the names of these 80 persons were improperly omitted by the clerk from the lists he prepared.

Judgment.
Street, J.

The next question, and it is of some difficulty, is whether the omission of these persons from the list of persons entitled to vote upon the by-law is an irregularity so serious as to require that we should quash the by-law. Under sec. 204 of the Municipal Act the by-law must stand if it appears to us "that the election was conducted in accordance with the principles laid down in the Act," and that the irregularity complained of did not affect the result.

I think as a general rule that an election should be held to have been conducted in accordance with the principles laid down in the Act, when the directions of the Act have not been intentionally violated, and when there is no ground for believing that the unintentional violation of them has affected the result. That appears to me to be the state of things presented upon the material before us. It is true that the names of some 80 persons entitled to vote upon this by-law were omitted by the clerk from the lists furnished the officers conducting the voting; but this was done under a misapprehension of the meaning of the Act, and not from any evil design. I think, under those circumstances, we are bound to assume that all the persons left off the list would have voted against the by-law; but we are not bound to go beyond this assumption, or to assume that the error had any effect upon the minds of the persons upon the list who voted or abstained from voting. If then we add the votes of the 80 persons whose names were left off the lists, to the 87 votes which were actually cast against the by-law, we still find that the by-law (for which 185 votes were cast) would be carried by a majority of 18 votes.

Had it been shewn that the result of the error had in any way affected the votes which were cast, or that persons who would otherwise have voted had abstained from doing so on account of the error, or that there was

Judgment. any other good ground for believing that the result might probably have been different had the lists been properly prepared, we ought to have given effect to the objection raised.

Street, J.

In the absence, however, of any evidence of this character, I do not think we should quash the by-law upon vague suggestions that the result may have been affected : see *Woodward v. Sarsons* (1875), L. R. 10 C. P. 733, 743, the principles of which I have followed.

E. B. B.

STEWART ET AL. V. FERGUSON.

Mortgage—Redemption—Interest post Diem—Excessive Payment—Application on Principal—Mistake.

A mortgage having properly borne interest at eight per cent. during its currency, and this having been regularly paid, the parties went on after the mortgage fell due, the one paying and the other receiving the eight per cent. for a long period, in ignorance that the liability was to pay only six per cent. Seven annual payments of interest were thus made after maturity at the mortgage rate, and subsequently some payments at a lower rate, the mortgage money not being called in meantime. All the receipts given stated that the payments made were on account of interest. Both parties were ignorant of the law on the subject, and believed that the mortgage rate would continue until payment of the principal :—

Held, that the money could not be recovered back by the mortgagor as money paid under a mistake, nor could the excess of interest be applied in reduction of the principal in a redemption action.

Rogers v. Ingham (1876), 3 Ch. D. 351, followed.

Statement. APPEAL by the defendant from a report of the Master at Woodstock in an action for redemption.

The action was brought by the widow and children of the deceased mortgagor. The mortgage was for \$700, and was made in 1878, payable in three years. After maturity the mortgagor, and his widow, continued to pay interest at the mortgage rate (eight per cent.) for some years. Upon taking the accounts the Master allowed the excess of interest over six per cent. after maturity to be applied on principal. The facts are stated in the judgment.

The appeal was heard by FERGUSON, J., in the Weekly Argument. Court, on the 21st September, 1899.

A. Millar, Q.C., for the defendant, contended that the excess of interest could not be applied in reduction of principal, having been paid as interest, citing *Quinlan v. Gordon* (1861), 20 Gr. Appx. i.

J. Bicknell, for the plaintiffs. In all the cases on this subject there was an agreement as to interest, and there was no principal due at the time of payment of interest, and they are all distinguishable from this case: *Kaines v. Stacey* (1860), 9 C. P. 355; *Jarvis v. Clark* (1861), 10 C. P. 480; *Quinlan v. Gordon* (1861), 20 Gr. Appx. i.; *Hutton v. Federal Bank* (1883), 9 P. R. 568. See, also, *Popple v. Sylvester* (1882), 22 Ch. D. 98.

October 5, 1899. FERGUSON, J. :—

The first ground of appeal stated by the defendant is that the Master was wrong in finding as he did by the 4th paragraph of the report that the first nine payments mentioned in the said 4th paragraph were made generally on account of the mortgage, and that he should have found that the said nine payments were made entirely on account of and in payment of interest on the said mortgage to the 14th day of January, 1894.

The mortgage was dated the 14th day of January, 1878. It was to secure the sum of \$700. It provided for payment of interest on this sum at the rate of eight per cent. per annum on the 14th day of January each year till the 14th day of January, 1881, when the principal sum was to be paid. The principal money has not been paid yet.

The nine payments spoken of in this first ground of appeal were, as found in the 4th paragraph of the report, from the 14th January, 1887, to the year 1894, inclusive. Each of the first seven of them is for the sum of \$56, and the other two are, one of \$51 and the other of \$42. Two of them appear to have been made in the year 1894. In respect of seven of these nine payments a receipt for each is produced, and each one of such receipts

Judgment. states expressly on its face that the payment is for interest
Ferguson, J. on the mortgage. There are also mentioned in the same 4th paragraph of the report two other payments of \$35 each, and a receipt for each of these is produced that states expressly that the payment was a payment of interest, indicating that by the time these payments were made, in 1896 and 1897, the rate of interest charged had been reduced from eight to five per centum.

Upon all the evidence there is regarding the nine payments mentioned in this first ground of appeal, I am clearly of the opinion that each and every one of them was, in fact, made on account of and as payment of interest on the mortgage money, and that the finding of the Master that they were made generally on account of principal and interest (if such is the meaning of his finding) is erroneous.

A second ground of appeal is that the Master was wrong in finding, in the 5th paragraph of his report, that there was no express or implied agreement between the plaintiffs, or any of them, and the defendant, that the defendant should be entitled to charge interest at the rate of eight per centum after the 14th day of January, 1886; that the defendant was entitled to charge six per centum only; and that all payments made from time to time in excess of six per centum should be credited on account of principal money.

What appears is that the various sums referred to were paid as interest. This appears, as it seems to me, beyond doubt, and to me it is impossible to perceive how payments could be so specifically made from time to time, and so often, in the absence of an agreement to pay after the manner, for the purposes, and on the accounts expressly stated by the receipts, at the time of the payments being made.

A condition of things that may present itself to one's mind, after a perusal of the documents and evidence, is this:—The mortgage having properly borne interest at eight per centum during its currency, and this having been as it appears, regularly paid, the parties went on after the mortgage fell due, the one paying and the other receiving

the eight per centum for a very long period, in ignorance Judgment.
that there was a liability to pay only six per centum, and Ferguson, J.
that during this period seven of the payments (\$56 each)
now in question were made, and that, from some cause
that does not at all clearly appear, there was a reduction,
after which were made the other two payments (\$51 and
\$42), the mortgage money not being called in meantime.
Then, if it be assumed that both parties were ignorant of
the law on the subject, and believed that the rate of
interest mentioned in the mortgage would continue as the
rate to be paid until the principal money should be paid,
the case would fall under one of the propositions in the
case *Rogers v. Ingham* (1876), 3 Ch. D. 351, which may
be stated in this way : The Court will only relieve against
a mistake in law where, under the particular circumstances
of the case, there is some equitable ground which makes
it inequitable that the relief should not be granted, and
that, therefore, such relief will not be granted in a case
where, there being no fiduciary relationship between the
parties, and both parties have had a full knowledge of all
the facts, one party demands repayment of money received
by the other merely on the ground that, owing to a mis-
take in law, both parties had believed that the person
receiving the money was legally entitled to it. I do not
see a difference in this particular respect between the
right to recover money back and a right to have the
money applied in reduction of the principal of a mortgage
debt in a redemption action.

I am of the opinion that the learned Master has made
the cast of the figures to ascertain the sum to be paid on
redemption on an erroneous basis, and that all the sums
paid specifically as interest should be treated as payments
of interest, and should not be applied, in whole or in part,
in reduction of the principal money to be paid the
mortgagee upon redemption.

The report should be remitted back to the Master to
recast his figures on this basis, and the appellant should
have his costs of the appeal.

[DIVISIONAL COURT.]

THE CANADIAN BANK OF COMMERCE V. PERRAM.

Bills of Exchange—Indorsing Before Payee—Liability.

The defendant put his name on the back of a promissory note before it was endorsed by the plaintiffs, the payees; who then endorsed it "without recourse," and sued him on it:—
Held, that he was not liable either as endorser or as surety or otherwise.

Statement. THIS was an appeal by the plaintiffs from the judgment of McDougall, J., Judge of the County Court of the county of York, whereby on October 27th, 1898, he dismissed this action, which was brought against the alleged indorser of a promissory note, under the circumstances mentioned in the judgment of the Divisional Court.

The appeal was argued on April 13th, 1899; before ARMOUR, C. J., and STREET, J.

A. W. Anglin, for the plaintiffs, contended that Perram knew he was renewing a note already due, and making himself an endorser to the plaintiffs, and the question was in such cases, one of evidence: *Steele v. M'Kinlay* (1880), 5 App. Cas. 754; *Pegg v. Howlett* (1897), 28 O. R. 473; *Peck v. Phippon* (1852), 9 U. C. R. 73; *Macdonald v. Whitfield* (1883), 8 App. Cas. 733.

J. Kyles, for the defendant, contended that a person could not be held liable on a note, which was incomplete when he put his name to it: *Lecan v. Kirkman* (1859), 6 Jur. N. S. 17; *Skilbeck v. Porter* (1857), 14 U. C. R. 430; *Duthie v. Essery* (1895), 22 A. R. 191; *Bishop v. Hayward* (1791), 4 T. R. 470; *Britten v. Webb* (1824), 2 B. & C. 483; *Singer v. Elliott* (1888), 4 Times L. R. 524; *Jenkins & Sons v. Coomber*, [1898] 2 Q. B. 168; *Steer v. Adams* (1839), 6 O. S. 60; *Jones v. Ashcroft* (1841), 6 O. S. 154;

West v. Bown (1847), 3 U. C. R. 290; *Robertson v. Hue-* **Argument.**
back (1865), 15 C. P. 298; *Robertson v. Lonsdale* (1891),
 21 O. R. 600; Bills of Exchange Act, 53 Vict. ch. 33, sec.
 29 (D.)

The judgment of the Court was delivered on September 13th, 1899, by

ARMOUR, C. J. :—

This action is brought by the plaintiffs against the defendant as endorser of a promissory note dated May 10th, 1897, payable three months after the date thereof to the Canadian Bank of Commerce, London, Ontario, or order, at the Canadian Bank of Commerce, London, Ontario, for the sum of four hundred and fifty dollars, made by the Home Journal Publishing Company.

At the time the defendant put his name on the back of this promissory note the plaintiffs, the payees, had not endorsed it, and it seems clear that under these circumstances he cannot be held liable upon it. If the plaintiffs, the payees, of this promissory note had endorsed it before the defendant put his name on the back of it, in such case the plaintiffs, although prior endorsers to the defendant, would have been under the admissions in the case clearly entitled to recover the amount of it against the defendant: *Wilkinson v. Unwin* (1881), 7 Q. B. D. 636; but not having endorsed it until after he put his name on the back of it, they are not entitled to recover the amount of it.

The note not having been endorsed by the plaintiffs, the payees, before the defendant put his name on the back of it, he incurred no liability in respect of it. He did not become liable as an endorser under the law merchant, nor did he become liable as a surety because of the Statute of Frauds.

It is impossible to distinguish this case from that of *Jenkins & Sons v. Coomber*, [1898] 2 Q. B. 168, where the law, as I have stated it, is plainly laid down. See also

Judgment. *Steele v. M'Kinlay* (1880), 5 App. Cas. 754; *Macdonald Armour, C.J. v. Whitfield* (1883), 8 App. Cas. 733; *Lecuan v. Kirkman* (1859), 6 Jur. N. S. 17; *Singer v. Elliott* (1883), 4 Times L. R. 524.

The cases of *Peek v. Phippon* (1852), 9 U. C. R. 73, and *Duthie v. Essery* (1895), 22 A. R. 191, are against the view I have expressed but I do not think that they are of equal authority with the cases I have relied on, and as this is the ultimate Court of Appeal in this County court case, we are bound to give our independent judgment.

It was alleged that the note in question was made payable to the plaintiffs through inadvertence, but this we cannot aid or relieve against.

And it was contended that the circumstances shewed an implied authority to the plaintiff to endorse the note as it was *post pro prius* or *nunc pro tunc* in order to aid the irregularity, but we are unable to infer from the circumstances any such implied authority: *Lecuan v. Kirkman* (1859), 6 Jur. N. S. 17.

The appeal must therefore be dismissed with costs.

A. H. F. L.

THE CORPORATION OF THE CITY OF KINGSTON V. ROGERS.

Assessment and Taxes—Arrears—Landlord and Tenant—Distress for Rent—Custodiā Legis—Seizure of Goods—Priorities—R. S. O. ch. 224.

There is nothing in the Assessment Act, R. S. O. ch. 224, to warrant a municipal tax collector seizing for arrears of taxes, goods, which being under distraint by a landlord, are *in custodiā legis*; and in this case subsequent rent having accrued due during the joint possession of the landlord and the collector, the landlord was also held to have priority in respect to another distress made by him for such subsequent rent.

THIS was an action brought to determine the right to Statement.
certain moneys the proceeds of goods levied upon by a landlord for rent, and also by a municipal tax collector, under the circumstances stated in the judgment.

The action was tried before STREET, J., at Kingston, on September 25th, 1899, without a jury.

McIntyre, Q.C., and *D. McIntyre*, for the plaintiffs, cited *Anderson v. Henry* (1898), 29 O. R. 719, 724; *Fraser v. Page* (1859), 18 U. C. R. 327; *American & English Encyclopædia of Law*, 1st ed., vol. 25, p. 308; *King v. England* (1864), 4 B. & S. 782; *Hersee v. Porter* (1885), 100 N. Y. 403; *Woodfall's Landlord & Tenant*, 13th ed., p. 417; *Christie v. City of Toronto* (1894), 25 O. R. 425, 606; The Assessment Act, R. S. O. ch. 224, secs. 131, 135, sub-sec. 1, clauses 1, 2, 4, sub-clause (a) (b); The Landlord and Tenant Act, R. S. O. ch. 170, sec. 3.

W. F. Nickle, for the defendant, referred to *Jones v. Biernstein*, [1899] 1 Q. B. 470; *Langtry v. Clark* (1896), 27 O. R. 280.

September 28th, 1899. STREET, J.:—

The material facts may be stated as follows:

One Robinson was tenant to the defendant of a shop in St. Lawrence ward, in Kingston, and his rent being in arrear, the defendant on February 6th, 1899, distrained for \$285.25,

Judgment.
Street, J.

the arrears. Robinson begged that the bailiff should not continually remain upon the premises as he hoped to settle the matter in a day or two and wished to continue his business meantime. The bailiff, with the landlord's consent, after an inventory had been made, took the tenant's undertaking or receipt for the production of the goods, and went out of actual possession for a day, but then came back again and resumed possession, but did not remain upon the premises at night.

On February 13th, 1899, one Gardner seized the same goods upon a warrant from the collector of the city of Kingston for \$501.63 arrears of taxes accrued upon the premises and upon other property, the whole of which had been assessed to Robinson personally. From the time of the seizure by Gardner, his agent and the landlord's bailiff jointly remained in possession, each disputing the other's right. Finally the goods were sold by arrangement and the proceeds, amounting to \$434.69, were paid into a bank to await the decision as to the rights of the parties to it. In the meantime, and while the joint possession continued, the defendant, as landlord, put in, on March 2nd, 1899, a further distress for \$93.75, being the quarter's rent then just due.

The whole question then in the present case is whether the rights of the landlord for the whole or any part of the rent for which he has distrained are to be preferred to those of the city under the circumstances above stated, for I decided at the trial that the warrant of the collector had been properly issued and was valid.

I have been able to find no decision expressly upon the point which here arises for determination. The clause under which, if at all, the city were entitled to take these goods is the 1st sub-sec. of the 135th sec. of the Assessment Act, R. S. O. ch. 224, which provides that the collector may levy for arrears of taxes "upon the goods and chattels, wherever found, within the county * * * belonging to or in the possession of the person who is actually assessed for the premises, and whose name appears upon the

collector's roll for the year as liable therefor." I do not think that any thing in the subsequent part of section 135, either enlarges or contracts the powers given by the subsection I have quoted upon the facts of the present case. If the collector was not entitled to levy under that subsection he is not given power to do so under anything that succeeds it.

Judgment.
Street, J.

I have come to the conclusion that there is nothing in this section or any other section of the Assessment Act which authorizes the collector to levy upon goods which are already *in custodia legis* as goods under seizure by a bailiff for arrears of rent due a landlord undoubtedly are.

The words of the section are no doubt of a sweeping character, but they must be taken to have been intended to be limited by existing principles and not to have been intended to establish exceptions to them. When a landlord distrains for rent he is doing an act which is recognized by many Acts of Parliament, and his right is to take into his sole custody the goods of the tenant, keeping them as a pledge for his rent until the time at which he may realize upon his pledge by sale. If I were to hold that the collector by his bailiff might also come in and hold the goods already under seizure by the landlord for rent as a pledge for the taxes, I should be interfering with the prior rights of the landlord and authorizing the collector's bailiff to do something which a sheriff armed with an execution could not do. "Goods in the custody of the law are not distrainable, for it is *ex vi termini* repugnant that it should be lawful to take goods out of the custody of the law, and that cannot be a pledge to me which I cannot bring into my actual possession. Hence, it is, that goods distrained for damage feasant cannot be taken for rent; nor goods in a bailiff's hands on an execution; nor goods seized by process at the suit of the king; nor will replevin lie for them:" Gilbert on Distress, 4th ed., p. 40; Foa's Landlord & Tenant, 2nd ed., p. 388.

In my opinion there was for these reasons no valid seizure of the goods by the collector. If he could have

Judgment. induced the landlord to withdraw his distress by paying or agreeing to pay his rent out of the proceeds of the sale the difficulty in his way would have been removed. The landlord's bailiff, however, retained possession of the goods as he was entitled to do until they were sold, and he is, in my opinion, right in his contention that not only the rent for which he originally distrained, but that for which the subsequent distress in March was put in should be paid him as a just charge upon the proceeds of the goods.

Street, J.

As to the disposition of the balance of the proceeds of the goods, if any after paying the claim of the defendant, I make no order.

With the declaration of the defendant's right to be paid the two sums for which he distrained, the action must be dismissed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

IN RE ROCHON.

Assignments and Preferences—Examination of Insolvent Debtors—County Court Judge—Power to Commit—R. S. O. ch. 147, secs. 34, 36—Prohibition—Appeal.

A County Court Judge has no jurisdiction to commit an insolvent debtor for unsatisfactory answers on his examination under the Assignments and Preferences Act, R. S. O. ch. 147, secs. 34, 36.

Statement. THIS was a motion by way of appeal from an order of the junior Judge of the County Court of Carleton, directing the committal of the appellant for unsatisfactory answers upon his examination as an insolvent debtor, under the Assignments and Preferences Act (R. S. O. ch. 147, sec. 34), and in the alternative for an order prohibiting the enforcement of the order upon the ground that the Judge had no jurisdiction to make it.

The motion was argued on September 12th, 1899, before **Argument.**
ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ.

Aylesworth, Q.C., for the appellant, contended that the County Court Judge had no more authority to make such an order, than a special examiner would have had : R. S. O. ch. 147, sec. 34 ; *Re Pacquette* (1886), 11 P. R. 463 ; *Baby v. Ross* (1892), 14 P. R. 440 ; *Regina v. Gibson* (1898), 29 O. R. 660.

Watson, Q. C., for the assignee for creditors, contended that the word "Judge" in R. S. O. ch. 147, sec. 36, included a County Court Judge ; and that the "Judge" whether of the High Court or County Court was *persona designata* : *Re Simpson v. Clafferty* (1899), 18 P. R. 402. This Court was not the proper place to apply for a prohibition.

Per Curiam.—The power to commit given by the Act can only be exercised by the High Court or a Judge thereof under the words "the Court or Judge" in section 36 ; and the County Court Judge had no jurisdiction to make the order. The order must go for prohibition, which is the proper remedy. Appeal dismissed. No order as to costs.

A. H. F. L.

TOMPKINS V. THE BROCKVILLE RINK COMPANY.

Municipal Corporations—Fire Limits By-law—Consolidated Municipal Act 1892, sec. 496, sub-sec. 10—Right to Maintain Action for Breach of.

Where a statute provides for the performance of a particular duty, and some one of a class of persons, for whose benefit and protection the duty is imposed, is injured by the failure of the person required to do so to perform it, an action, *prima facie*, and if there is nothing to the contrary, is maintainable by such person; but where the particular course of conduct is imperative and the non-performance is, in the general interest, punishable by penalty, an action will not lie.

Where, therefore, under authority conferred by sub-sec. 10, sec. 496 of the Consolidated Municipal Act 1892, a by-law was passed by a council of a city, setting apart certain areas as fire limits where no wooden buildings could be erected, and providing that buildings erected in contravention thereof might be pulled down and removed by the corporation at the cost of the owner, and a penalty of \$50 was imposed, the erection of a wooden building within such limits, does not give a right of action to the owner of contiguous property which is injuriously affected thereby.

Statement. THIS was an action tried by MEREDITH, C. J., without a jury, at Brockville on the 14th March, 1899.

Aylesworth, Q.C., and Brown, for the plaintiff.

Shepley, Q.C., and Buell, for the defendants.

Judgment was reserved, and subsequently the following judgment was delivered in which all the facts so far as material are stated.

June 17th, 1899. MEREDITH, C. J.:—

The plaintiff is the owner of lots 61 and 62 on the south side of King street in the town of Brockville, upon which are erected brick and stone buildings occupied as shops; and the defendants are the lessees of the easterly eighty-five feet of lot fifty-nine on the south side of the same street, the easterly limit of their land being distant fifty feet from the westerly limit of that of the plaintiff.

The plaintiff's land and the northerly 150 feet of the lands of the defendants are within the fire limits as established by by-law of the municipal council of the

town, passed on the 20th day of April, 1896, under the authority of sub-sec. 10 of sec. 496 of the Consolidated Municipal Act, 1892.

Judgment.

Meredith,
C..J

At the time the action was begun, the defendants were engaged in erecting a rink on their lands, which the plaintiff alleges is a wooden building within the meaning of the by-law, and was, as he also alleges, being built in contravention of its provisions.

The by-law declares by its first section, that:—“(1) From and after the passing of this by-law it shall not be lawful for any person or persons, corporation or corporations, within the following areas or parts of the town of Brockville herein called the fire limits of the town of Brockville, to erect, or cause to be erected, any wooden building, or part of, or addition to a wooden building, or to extend or enlarge any wooden building heretofore erected, or to cover wholly or in part, or to relay or repair any building of any kind now erected or erected hereafter, with shingles unless the same be laid in hair mortar not less than half an inch in thickness, or to erect or cause to be erected or rebuilt any building immediately adjoining another building unless the gable walls or party walls are of brick or stone and carried up to a height at least eighteen inches above the roof, or to repair or alter the gable walls or party walls of any building already constructed which immediately adjoins another building unless such gable walls or party walls are carried up to the said height of eighteen inches above the roof.”

Section 2, after defining the fire limits, contains the following provision:—

“Any building or erection which may be constructed, repaired, or placed in contravention of this by-law, may be forthwith pulled down and removed by such officer or officers of the corporation or other person or persons as the council shall direct; and the owner of such building or erection shall upon demand forthwith pay to the treasurer of the corporation the cost of said pulling down and removal.”

Judgment.

Meredith,
C.J.

The by-law imposes a penalty of not less than one dollar or more than fifty dollars upon any person offending against its provisions (section 17).

The plaintiff's case is that his property will be depreciated in value, owing to the erection of the defendants' building, and that the fire insurance rates on his buildings will be substantially increased because of the proximity to them of the defendants' building, owing to the material of which and the manner in which it is constructed, which would not be the case had the by-law not been contravened; and he claims from the defendants damages for these alleged injuries; a judgment or order for the removal at the expense of the defendants of their building, and "an injunction restraining the defendants from a repetition of the act complained of."

The defendants besides denying that their building is a wooden one within the meaning of the by-law (although that is admitted in the statement of defence), and taking issue as to the damages alleged to have been sustained by the plaintiff, contest the plaintiff's right of action both for the recovery of damages and for the injunction, contending that a contravention of the by-law, even though such damages as the plaintiff claims are occasioned to him by reason of it, gives him no right of action, and that the only remedy open to any one to obtain redress is by a prosecution for the penalty which the by-law imposes; or by the pulling down and removal of the building under the provision of the by-law for that purpose which has been referred to, or both.

If the broad proposition laid down in *Couch v. Steel* (1854), 3 E. & B. 402, that wherever a statutory duty is created any person who can shew that he has sustained injuries from the non-performance of that duty can bring an action for damages against the person on whom the duty is imposed, could now be maintained, subject to the observation which I shall presently make, the plaintiff's case would probably be made out. The subsequent cases, however, shew that this proposition is not maintainable.

In *Atkinson v. Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex. D. 441, grave doubts were expressed as to whether the authorities cited by Lord Campbell justified his proposition; and the question as to whether an action will lie by a private person who is injured by the omission of another to perform a statutory duty it is said must depend to a great extent on the purview of the legislature in the particular statute, and the language which they have there employed.

Judgment.
Meredith,
C.J.

In *Cowley v. Newmarket Local Board*, [1892] A. C. 345, the late Lord Herschell, referring to the serious doubts expressed in the last case, "whether" as he puts it "the case of *Couch v. Steel* (1854), 3 E. & B. 402, was rightly decided, and whether the broad general proposition could be supported, that whenever a statutory duty is created any person who can shew he has sustained injury from the nonperformance of that duty can maintain an action for damages against the person on whom the duty is imposed," says that he shares those doubts and the opinion expressed by Lord Cairns that much must "depend on the purview of the legislature in the particular statute and the language which they have there employed" (p. 352).

Groves v. Lord Wimborne, [1898] 2 Q. B. 402, is the latest case which I have seen in which the question is considered. Concurrence is there expressed by the Judges in the views of Lord Cairns in *Atkinson v. Newcastle and Gateshead Waterworks Co.*, to which I have referred.

This case establishes that where, applying the test suggested by Lord Cairns and approved by Lord Herschell, it appears that the statute "provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie*, and if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty" (*per* Lord Justice Vaughan Williams, at pp. 415-16); and I take it to be a corollary of this that where the legislature

Judgment. renders a particular course of conduct imperative, and a
Meredith, deviation from it punishable by penalty in the general
C.J. interest of the public at large *prima facie*, and if there be nothing to the contrary, an action by a person injured by failure to perform the duty imposed does not lie.

In *Toronto Street R. W. Co. v. Dollery* (1886), 12 A. R. 679, at p. 683, Sir John Hagarty, referring to the claim of the plaintiff as far as it was based on the action of the defendant, being done in contravention of a city by-law, says: "I do not rest the plaintiff's right to damages on the violation of the city by-law. If they have the right to recover, I prefer placing it on firmer ground. The reversal by the Court of Appeal of *Atkinson v. Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex. D. 441, and the rough criticism there applied to such cases as *Couch v. Steel* (1854), 3 E. & B. 402, must make such a ground of recovery rather doubtful."

But for what is said in the cases I have referred to, I should have thought that Lord Campbell did not intend to lay down so broad a proposition as he is said to have enunciated in *Couch v. Steel*, but limited his proposition to cases in which the duty is imposed for the benefit of particular persons, and to actions by such persons for injuries occasioned to them by the failure to perform the duty imposed, as put in the passage from Com. Dig. Action upon statute F., which Lord Campbell quotes at page 411.

It would appear, too, that Lord Campbell's opinion was that an action would not lie in the circumstances of the present case. Referring to *Stevens v. Jeacocke* (1848), 11 Q. B. 731, he says that that case "is clearly distinguishable from the present: no duty was, by the statute in that case, imposed upon the defendant: he was only prohibited under a penalty from exercising the right of fishing to the extent he had it at the common law. He was not bound to perform any particular duty created by the Act, but to forbear to do that which but for the Act he might have done:" *Couch v. Steel*, at p. 413.

If this distinction is not open to the objection urged against it by counsel in *Atkinson v. Newcastle and Gateshead Waterworks Co.*, that there is no difference between a duty not to do a thing and a duty to do a thing, as far as regards their character as duties, it is entirely apposite to this case for here no duty was by the by-law imposed upon the defendants, they were only prohibited under a penalty from erecting a particular kind of building, which they had at common law the right to erect; they were not bound to perform any particular duty created by the by-law, but to forbear to do that which but for the by-law they might have done.

Judgment.
Meredith,
C.J.

In Addison on Torts, 7th ed., p. 74, the law is thus stated: "Where no specific right is vested in the plaintiff for his own benefit and advantage, and no specific duty in favour of the plaintiff has been imposed, but the statute merely prohibits a thing from being done under a penalty for doing it, an action for damages is not maintainable."

I also refer to Pollock on Torts, 5th ed., pp. 188 *et seq.*; *Guardians, etc., of Holborn Union v. Vestry, etc., of St. Leonard Shoreditch* (1876), 2 Q. B. D. 145; *Ross v. Rugge-Price* (1876), 1 Ex. D. 269; *Vallance v. Falle* (1884), 13 Q. B. D. 109.

Looking then at the purview of the Legislature in the present case, it appears to me that the prohibition authorized to be enacted and which was enacted by the by-law is legislation not in the interest of any particular class of property owners but of the public at large; and that it was not intended that any such right as the plaintiff asserts should be conferred, but that the intention was that the remedy for a breach of the municipal regulation was to be found within the four corners of the by-laws which the municipal council might see fit to pass.

It is not without significance, I think, that the Legislature for the first time in 1873 conferred upon municipal councils power to legislate for the pulling down and removal of buildings which should be erected in contravention of its by-laws passed under the authority of the provisions of

Judgment. the Municipal Act, to which reference has been made, thus
Meredith, indicating, as it appears to me, that it was not intended
C.J. that any one suffering injury from a contravention of the
by-law should have the right which the plaintiff claims
but rather to leave the municipal councils to act as they
deemed best in the public interests.

When one looks at the number of acts lawful to be done at common law which municipal councils are by the Municipal Act permitted to prohibit or to regulate, and the number of duties which do not exist at common law which they are permitted to impose in respect of persons and property within their jurisdiction, one is startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the nonperformance of it.

The by-law in question seems to me not to have been designed primarily or at all to keep down the fire insurance rates which the owners of property whether adjacent or near to a building proposed to be erected should be required to pay upon their property, but to have had a broader and more public purpose in view, namely, to prevent the spread of a conflagration in the more thickly built up parts of the municipality, the danger of which would be increased by the erection of wooden buildings and buildings constructed of material easily ignited by contact with fire.

Nor can it have been intended, I think, that one who had erected a building in contravention of the provisions of such a by-law, the erection of which had excited no apprehension of danger from fire, nor led to any steps being taken for its pulling down or removal, should be liable to compensate every one who should be injured by fire communicated to his property owing to the inflammable character of the building erected, involving, it may be, the loss of many thousands of dollars.

The only case in our own courts which I have met with in which it has been attempted to prevent by injunction the contravention of such a by-law, is *Attorney-General v. Campbell* (1872), 19 Gr. 299.

In that case, the prosecution was by information by the Attorney-General, and the case was put upon the footing of the building being a public nuisance which ought to be abated.

Judgment.

Meredith,
C.J.

No suggestion was made in the pleadings or by counsel that the case could be rested upon any other ground; and Vice-Chancellor Strong, before whom it was heard, treated the right to relief as dependent upon whether the infraction of the by-law constituted a nuisance. It was, however, unnecessary to decide that question, the by-law having been held to be *ultra vires*, and the plaintiff's case, therefore, failing on that ground.

I was not referred to and have not been able to find any case in the courts of the neighbouring republic in which such an action as this has been held to be maintainable, except the case of *Aldrich v. Howard* (1862), 7 Rd. Id. 199, cited by Mr. Aylesworth. In coming to the conclusion in that case that the action lay, reliance was, however, placed upon the decision in *Couch v. Steel*, the authority of which had not at that time been shaken as it has since been.

In Michigan, the decision of the Supreme Court, in *Village of St. Johns v. McFarlan* (1875), 33 Mich. 72, was that a court of equity had no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done would, if carried out, be a nuisance; that the erection of a wooden building within the limits of a city or town, was not in and of itself, and that the fact that it is prohibited by ordinance did not make it a nuisance, and that the increased risk of fire and consequent danger to adjoining property from the erection of a wooden building in a thickly settled portion of a village did not warrant a court of equity in interfering by injunction to restrain the erection.

To the same effect is the decision of the Supreme Court of Wisconsin, in *President and Trustees, etc., of Waupun v. Moore* (1874), 34 Wis. 450.

It was also decided by Chancellor Walworth, in *Mayor,*

Judgment. *etc., of Hudson v. Thorne* (1838), 7 Paige (N.Y.) 261, that
Meredith, the Court of Chancery would not interfere by injunction to
C.J. enforce the penal laws of the State or the by-laws of a corporation unless the act sought to be restrained is in itself a nuisance.

In *McCloskey v. Kreling* (1888), 76 Cal. 511, it was held that if an ordinance establishing fire limits gives a right of action, the injury must be special in its character and not merely greater in degree than that of the general public, and that depreciation in the value of property and increase of insurance rates are not such special injury. From the language used in delivering the judgment, I conclude that it was thought by the court to be at least doubtful whether the right of action existed in any case.

Rhodes v. Dunbar (1868), 57 Penn. R. 274, may also be referred to.

The proper conclusion to be come to on the main question is, I think, that no such right of action as the plaintiff asserts is vested in him. Upon principle, as well as upon authority, I am, in my opinion, bound to hold that it was not within the purview of the Legislature that any one injured, as the plaintiff claims that he has been, by acts done in contravention of such a by-law as that in question in this case should have a right of action against the person by whom those acts were committed, and it is satisfactory to me to find that the weight of authority in the American Courts accords with the conclusion to which I have come.

It was, however, urged by Mr. Aylesworth that, even if there is no right of action to recover damages, the defendants' act being unlawful and being injurious to the plaintiff, the plaintiff is entitled to an injunction to restrain it, and in support of that argument *Cooper v. Whittingham* (1880), 15 Ch. D. 501, a decision of the late Sir George Jessel, was referred to.

I do not think, however, that Sir George Jessel intended to lay down any such broad proposition as that contended for. The passage of his judgment on which reliance is

placed has reference plainly to the ancillary remedy in equity by injunction to which Sir George Jessel has just referred,—that to protect a right,—in that case the plaintiff's copyright which was being pirated,—and has no application to such a case as the present, where the plaintiff has no right to protect appertaining to him as owner of the property apart from the by-law or conferred upon him by the by-law.

Judgment.

Meredith,
C.J.

I have dealt with the case as if the prohibition of the erection of wooden buildings had been contained in the Municipal Act itself, for I can see no difference, as far as the questions involved are concerned, between that which is prohibited by direct enactment of the Legislature and that which is forbidden by a municipal by-law passed under the authority of an Act of the Legislature: *Ross v. Rugge-Price* (1876), 1 Ex. D. 269.

If I had come to a different conclusion, it would have been necessary to determine whether the defendants' building is a wooden building within the meaning of the by-law—for the application of the defendants' counsel to amend by striking out the admission that it is, should, I think, be granted,—but, having come to the conclusion that, even if the defendants' act is a contravention of the provisions of the by-law, the plaintiff's case fails, it is unnecessary to express any opinion upon that point.

I may refer, however, to the following cases as bearing more or less upon this branch of the case: *City Council of Montgomery v. Louisville and Nashville R. W. Co.* (1888), 4 Southern Rep. 626; *City of Charleston v. Reid* (1886), 27 West Virg. 681; *London County Council v. Pearce*, [1892] 2 Q. B. 109; *London County Council v. Humphreys*, [1894] 2 Q. B. 755.

The result is that in my opinion the plaintiff's case fails, and his action must be dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

WATSON V. HARRIS.

Patent of Invention—Subsequent Patent—Improvement on First Patent—Assignee of First Patent—Rights of.

The defendant and another, who had acquired by assignment from the inventor a patent for making fuel from garbage, etc., assigned to the plaintiff one-third interest therein and all improvements and amendments thereto, it being also contemplated that the invention could and would be utilized for making gas. The defendant subsequently procured a patent for making gas from such garbage, etc., the ingredients used in the production under the second patent being the same or the equivalents of those used under the first patent, any alleged change therein being designed merely to enable the defendant to appear to employ different materials, while in substance and effect the same; his dealings also with the plaintiff, after he had procured the second patent were on the footing that the plaintiff was to have the same interest therein as in the first patent.

A claim by the plaintiff that he was entitled to the benefit of the second patent as an improvement within the meaning of the first patent under the terms of the assignment was upheld.

It was not necessary that the second patent should have been an infringement of the first one to enable the plaintiff to claim it as an improvement, the word "improvement" within the meaning of the assignment not being used in a technical sense nor as having any defined legal meaning, but according to its popular use, for the parties were dealing not with a particular composition described in the first patent but with the development of the central idea underlying it.

Statement. THIS was an appeal by the defendant from the judgment pronounced by FALCONBRIDGE, J., in favour of the plaintiff after the trial of the action at the Toronto non-jury sittings.

On May 10th, 1899, the appeal was argued before a Divisional Court composed of MEREDITH, C. J., and ROSE, J.

S. C. Smoke, for the plaintiff.

H. R. Welton, for the defendant.

July 14th, 1899. The judgment of the Court in which the facts are fully stated was delivered by

MEREDITH, C.J.:—

Judgment.

Meredith,
C.J.

Jean D. Oligny and Daniel O. Frye, and the defendant, on the 2nd October, 1894, obtained letters patent of the Dominion of Canada, No. 47129, for new and useful improvements in garbage and peat fuel.

Oligny was the inventor, and had assigned to Frye and the defendant one-half interest in his invention.

The specification and claim of Oligny, as set out in the schedule to the letters patent, are as follows:—

“My invention, which will be hereinafter fully set forth and claimed, relates to artificial fuel obtained from the utilization of garbage, city refuse, peat, and the like.

“The object of my invention is two-fold, being the manufacture of a cheap artificial fuel, and at the same time the disposal and utilization of waste products, such as garbage, city refuse, sawdust, peat, manure, and the like.

“I make a composition of the following ingredients well mixed together: One hundred gallons of sodius oil, ten pounds of chloride of calcium, three hundred and thirty-three grammes of caustic soda and one hundred and fifty grammes of powdered soap; this quantity being sufficient for four tons of fuel or thereabouts, more or less, according to the nature of the other materials and their state of moisture or dryness.

“This composition is heated and as much garbage, refuse, peat or other materials, or all or any of them, is thrown and stirred in as will completely absorb it. Garbage containing up to sixty-five per cent. of moisture will yield good results when made into fuel with the above composition.

“I claim as my invention:—

“1. An artificial fuel composed of garbage, refuse, peat or other materials in such quantity as will completely absorb a composition consisting of one hundred gallons of sodius oil, ten pounds of chloride of calcium, three hundred and thirty-three grammes of caustic soda and one hundred and fifty grammes of powdered soap, or in about

Judgment. the proportions named, the whole yielding about four tons
Meredith, of fuel, substantially as set forth.
C.J.

"2. A composition for the preparation of artificial fuel, consisting of one hundred gallons of sodius oil, ten pounds of chloride of calcium, three hundred and thirty-three grammes of caustic soda and one hundred and fifty grammes of powdered soap, or thereabouts, substantially as set forth."

Frye and the defendant subsequently acquired the one-half interest of Oligny, and it was duly assigned by him to them.

On the 23rd of February, 1895, the plaintiff acquired from Frye and the defendant one-third interest in the patent, and by an instrument of that date made between Frye and the defendant of the one part and the plaintiff of the other part, after reciting the issue of the letters patent and the assignment of Oligny's interest to Frye and the defendant, and that the latter had applied to the plaintiff for financial assistance and for aid, and for the exercise of his efforts and influence to enable them to develop and advantageously dispose of the patent right and their interest in it, and that the plaintiff had agreed to assist Frye and the defendant for the consideration thereafter set forth, it is witnessed that Frye and the defendant assign to the plaintiff "an undivided one-third interest in and to the said patent of Canada, numbered 47129, for an improvement in garbage fuel, granted in October, 1894, as hereinbefore set forth, and to the rights, benefits and privileges conferred by the said patent and all improvements therein, whether by them the said parties of the first part, or by the said Jean D. Oligny, so that in all respects the said party of the second part shall have an equal undivided one-third interest with the said parties of the first part in and to the said patent and rights and improvements in and throughout the Dominion of Canada, the same to be held and enjoyed by the said George H. Watson to the full end of the term for which the said patent is granted as fully and entirely as the same could

have been held and enjoyed by the parties of the first part; and also to the full end of the term of any and every renewal thereof, and of all improvements and amendments thereto;" and the plaintiff covenanted to cause a claim of one Dickson on the patent for advances made by him to be satisfied, and to assist and protect Frye and Harris "from and against the liabilities incurred by them in respect to the business and development of the said patent right in and to the extent of \$2,100, including the advance made by the said Dickson; and will also use his best efforts and influence to promote and effect an immediate sale of the said patent right for Ontario and other parts of Canada, and will use his influence in this direction continuously until the sales are completed."

Judgment.

Meredith,
C.J.

It was found by the learned Judge that at the time of the negotiations between the plaintiff and Frye and the defendant it was contemplated that the invention could and would be utilized for the making of gas as well as the fuel mentioned in the specification and claim.

The learned Judge also found that after the defendant had obtained the letters patent, to which I shall afterwards refer, he dealt with the plaintiff on the footing that he was entitled to the same interest in that patent as he had acquired in the first patent, and that on that footing he procured the aid and assistance of the plaintiff in endeavouring to dispose of the patents, or of some interest in them, and that an agreement was come to between them as to the share in the two patents which each of them should give to the intended purchasers in order to induce them to buy, Frye having on application to him declined to give up any part of his interest for that purpose.

There was a conflict between the parties as to these matters, but we see no reason for differing from the conclusion reached by the learned Judge, especially in view of the corroboration of the plaintiff's account by the evidence of Frye, and of the terms of the plaintiff's letter to him of the 28th June, 1897, which the defendant admits was shewn to him before being sent.

Judgment.
Meredith,
C.J.

The language of this letter is consistent with the plaintiff's account of the transaction, and quite inconsistent with that of the defendant.

On the 6th December, 1897, the defendant obtained letters patent of the Dominion of Canada, No. 58293, for improvements in gas producing composition and method of preparation and generating gas from the same. His specification and claim are as follows:—

“My invention relates to improvements in gas producing compositions, and method of preparation and generating gas from same, and the object of the invention is to cheaply produce a highly illuminating and heating gas, and it consists in utilizing in a large proportion in such production garbage, night soil and other city refuse, peat, sawdust, manure, and the like, in its wet state, mixed with a small proportion of a chemical composition having a suitable liquid hydro-carbon dominant therein, and distilling the mixture into a suitable retort as hereinafter more particularly described and set forth.

“According to the best manner known to me in practising the invention I proceed as follows:—

“I first dissolve four pounds of caustic alkali, for instance caustic soda, eight pounds of chloride of lime, and three-quarters of a pound of soap bark in a suitable solvent, either water or alcohol, but preferably alcohol.

“The reason why I use alcohol is, that the ingredients dissolve in the same more quickly than in water, and therefore enable me to practice my invention with much less loss of time.

“After this composition is thoroughly dissolved, which I find occupies generally about half an hour, I mix it with one hundred gallons of a suitable liquid hydro-carbon, preferably that known as gas oil. This quantity of liquid when mixed is sufficient for sixteen thousand pounds, more or less, of garbage or other refuse.

“These quantities or portions may be varied more or less, this depending upon the particular nature of the materials, but the proportions stated are the preferable proportions.

"After the chemicals have been mixed with the gas oil, I pass the refuse in its wet state through a suitable mixer and spray, spread or otherwise permeate the refuse with the composition, so that it is thoroughly mingled with it.

Judgment.

Meredith,
C.J.

"The now completed composition is placed in a retort in its wet state and heated to an intense heat, so that distillation takes place, and the gas produced is carried off through suitable pipes to a gasometer. A super-heater is preferably used between the retort and the gasometer.

"The caustic alkali and chloride of lime prevent the liquid hydro-carbon from being distilled off at once, but maintains such a connection of the same with the garbage or other refuse that all the ingredients of the mixture are gradually and simultaneously distilled off, thereby effecting a complete distillation and copious flow of gas while the distillation continues. The gas which is produced is purified in any suitable manner, and is suitable for illuminating as well as for heating purposes. The gas generated by this process is in relatively larger quantities than the gas produced from coal, and at a very much lower cost.

"What I claim as my invention is:—

"(1) The herein described process of manufacturing gas from garbage or other refuse, which consists in mixing with the same a liquid hydro-carbon and then distilling the mixture substantially as set forth.

"(2) The herein described method of manufacturing gas from garbage or other refuse, which consists in mixing with the same a liquid hydro-carbon and alkali, and then distilling the mixture substantially as set forth.

"(3) The herein described method of manufacturing gas from garbage or other refuse, which consists in mixing with the same a liquid hydro-carbon, alkali and chloride of lime, and then distilling the mixture substantially as set forth.

"(4) The herein described method of manufacturing gas from garbage or other refuse, which consists in mixing with the same a liquid hydro-carbon, alkali, chloride of lime, soap bark, and then distilling the same substantially in the proportions and for the purpose set forth."

Judgment.
Meredith,
C.J.

The learned Judge has found that the ingredients used by the defendant, as described in his specification, are either the same or the equivalent of those described in the specification of the earlier patent; and there is evidence which points to the conclusion that any change made in the ingredients used was designed to enable the defendant to appear to employ different materials for his composition, while in substance and in effect he was using those described in the specification of the earlier patent.

The plaintiff's claim is, that he is entitled to the benefit of the defendant's patent as an improvement within the meaning of the agreement of the 23rd February, 1895.

The contention of the defendant is, that unless his invention be an infringement on the earlier patent—and he contends that it is not—it is not an improvement within the meaning of the agreement to the benefit of which it is stipulated that the plaintiff shall be entitled.

That position can not, in my opinion, be successfully maintained.

As said by Mr. Justice Grosscup in the case of the *Westinghouse Air Brake Co. v. Chicago Brake and Manufacturing Co.* (1898), 85 Fed. Rep., at p. 787, the question to be decided in such a case as this is to some extent a question of law, but more largely a question of fact.

It is true that the same learned Judge, at p. 790, treats identity of purpose and function as controlling the question whether one invention stands in the relation of an improvement to another; but, even if this were on the facts of this case the true test, it seems to me that the main central idea which the Oligny invention was designed to accomplish was the utilization of garbage as fuel, and that purpose the invention for which the defendant has obtained his patent is designed to serve. It is true that in the one case the composition was intended to be dried out so as to be susceptible of use as fuel in that state, while in the other distillation is substituted for the drying out, with the result that the product is a gas instead of the dry fuel—the fact that the gas may be used for illuminating pur-

poses as well as for fuel can, it seems to me, make no difference as to the rights of the plaintiff, if had a fuel gas only been the result he would have been entitled to the benefit of the invention.

Judgment.

Meredith,
C.J.

In a recent case in New Brunswick, *Jones v. Russell* (1899), 1 Sup. Ct. in Equity 232, Mr. Justice Tuck, dealing with an agreement somewhat like that which is in question here, declined to apply the test which the defendant contends is the proper one to be applied in determining what was an improvement within the meaning of an instrument by which an interest in an invention and all improvements that might subsequently be made was assigned, and rested his decision in favour of the assignee upon the ground that upon the fair construction of the agreement the assignee was to have the interest in any patent which the defendant (his assignor) might obtain for an improvement on the patented article, whether or not such patent should be an infringement of the former.

In my opinion the word "improvements" is not a technical one, and has not any defined legal meaning, but is to be interpreted in the sense in which it is popularly used. It is therefore necessarily an elastic term, and looking at the position of the parties at the time the agreement was entered into, what was then contemplated as to the uses to which the invention was to be applied, the incompleteness of what had been accomplished, and the necessity for development referred to in the agreement, it seems to me plain that what the parties were dealing as to was not merely the particular composition described in, or the particular thing which according to the patent was to be produced, but also any development of the central idea which underlay the Oligny invention, either in the more complete drying out of the composition or the obtaining from it of the gas which it contained by any means which the ingenuity of the parties might devise for that purpose, that the parties so understood their bargain I have on the findings of fact no manner of doubt, and there is nothing in my opinion in the language which they have used in

Judgment. the written agreement to render it necessary to so interpret it as to defeat the real intention of the parties, and no case which forbids such a construction being placed on that language as will effectuate that intention.

**Meredith,
C.J.**

In my opinion the appeal fails, and must be dismissed with costs.

G. F. H.

GOLDIE V. THE BANK OF HAMILTON.

Fire Insurance—Mortgage—Reconstruction of Machinery in Mill—Rights of First and Second Mortgagees and of Person Furnishing the New Machinery—Marshalling Insurance Moneys—Subrogation.

The owner of a mill property mortgaged it together with all the machinery, which was declared to be fixtures. Subsequently a second mortgage was executed by the mortgagor on the same property. Both mortgages were made under the Short Form Act, and contained covenants to insure, but the insurance moneys, under the policies effected on the property and machinery, were made payable to the first mortgagee. Afterwards the mortgagor, with the consent of the second, but without that of the first mortgagee, made a contract with the plaintiffs under which they placed new machinery in the mill using, as the contract provided, such of the old machinery as was necessary to complete the equipment, and taking and removing such of the old as was not required, the mortgagor agreeing with the plaintiffs to insure the machinery and assign the insurance to them. On the mill and machinery being destroyed by fire and the insurances adjusted, the second mortgagee paid off the first mortgagee's claim, and procured from him an assignment of his mortgage as well as of his interest in the policies:—

Held, that the plaintiffs could not claim, by reason of their betterment of the machinery, which prior to its reconstruction was deemed of substantial value, that they were entitled to the insurance moneys thereon to the detriment of the claim under the first mortgage; but that they were so entitled as against the second mortgage; and, therefore, after the claim of the assignee of the first mortgage was satisfied, the plaintiffs were entitled as against the second mortgage to be subrogated to the mortgagee's rights thereunder to the insurance moneys to the extent of the insurable value of the machinery put in by them.

Hobson v. Gorringe, [1897] 1 Ch. 192, remarked on with reference to its effect on the decisions in this Province as to fixtures.

Statement. THIS was an action tried by MEREDITH, C. J., at the non-jury sittings at Toronto on the 21st April, 1899.

W. R. Riddell, and *Hugh E. Rose*, for the plaintiffs.
Armour, Q. C., and *Lees*, for the defendants.

The facts are fully stated in the judgment.

July 14, 1899. MEREDITH, C. J. :—

Judgment.

Meredith,
C.J.

Emilie B. Harper, being the owner of a mill property in the township of West Flamboro', on the 5th October, 1894, with her husband executed a mortgage to Richard T. Wilson on it, "together with all buildings and erections on said premises, together with all machinery, apparatus, appurtenances and appliances in and upon the mills on said premises, whether the same are fixtures or not and used with said mills. Mill site and water privileges and all said machinery, etc., are hereby declared to be fixtures," for securing payment of \$8,500 and interest at the rate of seven per cent. per annum.

The mortgage is made in pursuance of the Act respecting Short Forms of Mortgages, and contains the statutory covenant to insure to the amount of not less than \$7,000.

Five policies of insurance were effected by Mrs. Harper.

1. Policy No. 1399 of the Canadian Millers' Mutual Fire Insurance Company, dated 8th January, 1897, and expiring 8th January, 1900, insuring \$1,000 on the machinery, belting, millwright work, tools and weigh scales (machinery not in use excluded), contained in the flour mill and its "annex."

2. Policy No. 1503 of the same company, dated 25th November, 1897, and expiring 25th November, 1900, insuring \$1,000 on the building only of the flour mill and annex, and \$1,000 on the machinery, etc., as in policy No. 1399.

3. Policy No. 1555 of the same company, dated 10th June, 1898, and expiring 10th June, 1901, insuring \$1,000 on the building only of the flour mill and annex.

4. Policy No. 183081 of the Waterloo Mutual Fire Insurance Company, dated 8th January, 1897, and expiring 8th January, 1900, insuring \$1,500 on the machinery, etc., as described in policy No. 1399.

5. Policy No. 194745 of the last mentioned company, dated 25th November, 1897, and expiring 25th November, 1900, insuring \$500 on the building of a chopping and

Judgment. barley mill and \$500 on the machinery, etc., contained
Meredith, in it.
C.J.

All of these insurances were effected in pursuance of the covenant to insure, and by the terms of the policies "the loss" is made payable to the mortgagee except in the case of policy No. 183081, but the application for that policy shews that it was intended to be made payable to the mortgagee; and it was assumed on the argument that all of the policies were in this respect alike.

Mrs. Harper and her husband on the 20th October, 1894, executed a mortgage to the Bank of Hamilton on the property, which is described in the same way as in the Wilson mortgage, for securing the indebtedness of the husband and of the firm of George H. Harper & Co. to the bank.

This mortgage also contains a covenant on the part of the mortgagors in the statutory form to insure the buildings on the lands to the amount of not less than their full insurable value.

The plaintiffs, on the 10th November, 1897, entered into a contract with Mrs. Harper, who traded under the name of George H. Harper & Co., for the placing of new machinery in the flour mill.

By the terms of the agreement the plaintiffs were to have the privilege of using any of the shafting, pulleys, belting, brackets, etc., as well as any of the machines then in the mill, which might be necessary to complete its equipment, and to be entitled to all the old machinery, shafting, etc., not used in the work to be done by them.

The agreement also provides that the title to the machinery which the plaintiffs agreed to supply was not to pass to Harper & Co. until paid for, and that in case of default in payment the plaintiffs should be at liberty to take and remove the machinery without liability to Harper & Co. for any damages which the firm might sustain in consequence of its removal, and that Harper & Co. should insure the machinery to its full insurable value and assign the policy to the plaintiffs.

Two-thirds of the value was, according to the evidence, the insurable value of the machinery.

Judgment.

The plaintiffs completed their contract with Harper & Co. on the 25th February, 1898, and in doing so availed themselves of the rights stipulated for as to the old machinery, using much of it in the reconstruction of the work and removing and applying to their own use the remainder of it.

Meredith,
C.J.

The amount which remains due to the plaintiffs by Harper & Co. under the contract is \$3,696.52.

The Bank of Hamilton was informed of the arrangements between the plaintiffs and Harper & Co. and of the terms of the contract which Harper & Co. were to enter into and which they afterwards entered into, as I have mentioned, and expressly assented to all of them, as appears from the cashier's letter to Harper & Co., dated 15th November, 1897.

Wilson, if he assented at all to the change of the machinery being made, did so, as I find, upon the understanding and agreement of the plaintiffs' representative that his rights under the mortgage were not to be affected, and that the rights of the plaintiffs under their agreement with Harper were to stand behind his claim as mortgagee.

Harper & Co. did not effect any further insurance on the property or upon the machinery put into the mill by the plaintiffs, but they communicated with the agent of the insurance companies as to further insurance, which the agent declined to undertake, but gave to Harper & Co., at their instance and on their request, his assurance that the new machinery which had been put in would be covered by the existing policies.

The mill and machinery were destroyed by fire on or about the 1st July, 1898, and the loss was adjusted on the mill building at \$2,000 and on the chopping and barley mill and the machinery of it at \$1,000, and as to these sums there is no question between the parties; and at \$4,500 in respect of the machinery, belting, millwright work, tools and weigh scales, insured by policies Nos. 1399,

Judgment. 1503 and 183081. This latter sum, less their costs, the insurance companies, owing to the conflicting claims upon them, have paid into Court; and the other two sums have been paid to the defendant Turnbull.

**Meredith,
C.J.**

On the 16th July, 1898, the defendant Turnbull, who is the cashier of the Bank of Hamilton, paid to Wilson \$7,136.93, the amount then due on his mortgage, and on the same day Wilson assigned to the defendant Turnbull the mortgage and all of the policies of insurance.

Evidence was given on the part of the plaintiffs for the purpose of shewing that the machinery in the mill at the time the plaintiffs began the reconstruction of it was not worth, treating the mill as a going concern, more than \$3,500; but I am not satisfied that it would be just to Wilson or right to accept that estimate as the true measure of its value, or that if the plaintiffs dismantled the mill without the consent of Wilson, that sum would be the proper measure of the damages which Wilson would be entitled to recover from them.

I find from the documents put in evidence that in the application made by Mrs. Harper on the 8th January, 1897, for the insurance effected by policy 183081, the value of the machinery is placed at \$6,000, and that the witness Jones, who placed the value of \$3,500 on it at the trial, himself valued it for his company at \$7,500 on the 30th October, 1889.

It is in the view I take of the rights of Wilson on the facts of this case, unnecessary to consider whether the machinery put into the mill by the plaintiffs remained chattels or formed part of the realty, or what, apart from the considerations I shall presently refer to, the respective rights of Wilson and the plaintiffs would have been. That inquiry would have been a difficult, and in the state of the authorities, an embarrassing one, and all I need say is that such consideration as I have given to the question leads to the conclusion that in view of the recent examination of it by the Court of Appeal in England and the decision of that Court in *Hobson v. Gorringe* [1897], 1 Ch.

192, the decisions in this Province may require to be reconsidered and perhaps somewhat modified.

Judgment.

Meredith,
C.J.

I have come, however, to the conclusion that the plaintiffs have not shewn that Wilson became entitled to receive in respect of the insurances effected for his benefit any greater sum by reason of the betterment of the mortgaged premises owing to the plaintiffs' reconstruction of the mill than he would have been entitled to receive had the improvement not been made.

Assuming that he did not assent to the change being made—and that is the position which the plaintiffs take—the plaintiffs were wrongdoers as to him and answerable for the damage occasioned to the inheritance by the taking out of the machinery which was removed. As the property stood before the changes were made Wilson was secured by the insurances in question, and had a fire then occurred, I do not doubt, would have been paid the full amount of them.

It would, I think, be a very dangerous course where the security of a mortgage has been interfered with wrongfully, that the wrongdoer should be permitted to cut down the value of the securities held by the mortgagee and with which he was content, unless upon the clearest proof as to the insufficiency of them. Here the machinery and the insurance on it constituted an apparent security to the mortgagee for at least \$4,500, and the evidence does not satisfy me that it was not a real security as well for that sum.

Wilson was, therefore, I think, entitled to the benefit of the insurance moneys; and the plaintiffs have no equity against him to deprive him or his assignee of any part of them.

Different considerations, however, apply to the case of the plaintiffs against the Bank of Hamilton and the mortgagors.

The mortgagors, had the property been unencumbered, would clearly, I think, have been bound to permit the plaintiffs to receive the insurance money on the machinery

Judgment. to the extent of the insurable value of the machinery put
Meredith, into the mill by the plaintiffs. By their contract Harper
C.J. & Co. bound themselves to insure the plaintiffs' machinery to that amount and to assign the policy to the plaintiffs. Probably, apart from the action of Harper & Co. in stipulating that the policies were to cover the new machinery, and certainly I think in view of that action as between the plaintiffs and Harper & Co., the plaintiffs became in equity entitled to the benefit of the subsisting insurance to the extent to which Harper & Co. had contracted to insure.

The Bank of Hamilton stands, I think, in exactly the same position as Harper & Co. in respect of these insurance moneys. It assented to all that was done by Harper & Co., and must be taken to have agreed that as against it and its mortgage, the plaintiffs should have the same rights as they were acquiring as against Harper & Co.

The defendant Turnbull, as the assignee of Wilson, having, according to my view of his rights in the premises, taken in satisfaction of his mortgage a fund to which, as against the bank and Harper & Co., the plaintiffs were entitled, the Bank of Hamilton, if it may hold the mortgaged property as it stands under its mortgage, would be getting the benefit of the application of the proceeds of the plaintiffs' property to increase the value of its security, and practically putting into its own coffers moneys which it had agreed should be paid to the plaintiffs for work done and material and machinery supplied on the faith of their agreement that the moneys should be so applied.

If this be a correct statement of the position of matters, there can be no doubt that the Court ought to interfere for the protection of the plaintiffs, and the proper remedy to be applied is, I think, to put the plaintiffs in the position of having a charge on the property to the extent to which their charge on the insurance moneys has been defeated. This may I think be done by subrogating them to the rights of Turnbull under his mortgage to the extent of the charge to which they are entitled, and may be

supported on the equitable principle of marshalling. Turnbull has two funds as his security—the land and the insurance moneys—and the plaintiffs a security on one of these funds—the insurance moneys—and their equity is to have the mortgage paid out of the fund upon which they have not security. This equity they are of course entitled to against the mortgagors, and although it is not to be applied against third persons, the Bank of Hamilton, for the reasons I have mentioned, is not to be treated as a third person, but stands, in my opinion, in no higher or better position than the mortgagors.

The result is that in my opinion the following judgment should be entered :—

A declaration that the defendant Turnbull, as assignee of the Wilson mortgage, is entitled to be paid out of the moneys paid into Court by the insurance companies, the balance remaining due on his mortgage after crediting thereon the sums already received by him from the insurance companies, and that the plaintiffs are entitled to the residue of the moneys in Court on account of the charge in their favour hereinafter declared, and judgment accordingly, and for payment of the moneys out of Court according to the rights of the parties as so declared.

A declaration that the plaintiffs are entitled to be subrogated to the rights and position of the defendant Turnbull under his mortgage to the extent of the insurable value of the work done and machinery and material supplied by them, which I take to be two-thirds of the amount of their claim; but if there is any question as to this a reference may be had at the risk of the party desiring it.

The plaintiffs will be entitled to the usual judgment for enforcing this charge, and their costs will be added to their claim.

On payment to the defendant Turnbull of the moneys directed to be paid out of Court to him he is to execute to the plaintiffs an assignment of the mortgaged premises for the purpose of securing the sum for which they are

Judgment.
Meredith,
C.J.

Judgment. declared to be entitled to a charge, and the other defendants are to join in it.

**Meredith,
C.J.**

There will be no costs to any other of the parties, or save as aforesaid.

G. F. H.

RE ASKWITH.

Evidence—Refusal to Answer Question—Criminating Answer—Liquor License Act—Committal.

The refusal "to answer any question touching the case" in section 115 of the Liquor License Act means any question which may be lawfully put, and which the witness is otherwise bound to answer: and a witness, on the prosecution of a hotelkeeper for selling liquor on Sunday, who declined to answer whether he, the witness, was at the hotel on the day in question, on the ground that his answer would tend to criminate him, and was committed to gaol by the magistrate until he consented to answer, was ordered to be discharged.

The Queen v. Nurse (1898), 2 Can. Crim. Cas. (Tremear) 57, approved of.

Statement.

THIS was a motion for an order for the issue of a writ of *habeas corpus* directed to the keeper of the common gaol of the county of Carleton to have the body of one Charles H. Askwith before the Court and for the issue of a writ of *certiorari* in aid and for the discharge from custody of the said Charles H. Askwith.

The motion was argued at the Weekly Court at Ottawa on the 17th June, 1899, before FALCONBRIDGE, J.

George F. Henderson, for the applicant.

Glyn Osler, for the Police Magistrate.

R. J. Sims, for the License Inspector.

It was contended that if the applicant answered the questions put to him, the answers would tend to criminate him and that he was not therefore bound to answer them, and the following statutes and authorities were cited: The Liquor License Act, R. S. O. ch. 245, secs. 57, 59 and 115; The Ontario Election Act, R. S. O. ch. 9, sec. 189; The Evidence Act, R. S. O. ch. 73, secs. 5 and 9; Taylor on

Evidence, Bl. ed., sec. 1453, p. 1242 ; Endlich on the Interpretation of Statutes, sec. 127 ; Maxwell's Interpretation of Statutes, 3rd ed., 399 *et seq.*: *Regina v. Fee* (1887), 13 O. R. 590 ; *The Queen v. Nurse* (1898), 2 Can. Crim. Cas. (Tremear), 57. Argument.

August 24th, 1899. FALCONBRIDGE, J.:—

One Michel Delorme was charged before the late Martin O'Gara, Esquire, Q.C., police magistrate, in and for the city of Ottawa, with selling liquor on Sunday, 21st May, 1899, in his hotel in Ottawa, and the applicant was summoned to appear as a witness on behalf of the prosecution.

The applicant was called on 10th of June as a witness, duly sworn, and said (as appears by the police magistrate's certificate):

"I was subpoenaed as a witness in this case." Q. "Were you at the defendant's hotel in the city of Ottawa on Sunday, the 21st of May last?" A. "I refuse to answer on the ground that the answer might tend to incriminate me."

Proceedings were then enlarged until the 13th of June when the learned magistrate again submitted the question to the applicant, and the applicant again declined to answer on the same ground; whereupon the magistrate "adjudged the applicant to be committed to the common gaol of the county of Carleton, there to remain until he consents to answer the said question."

The applicant files an affidavit setting out the facts and stating:

"I am satisfied that if an answer is given by me to the said question so asked in the said proceedings, such answer would tend to subject me to prosecution for a penalty under the provisions of the said Liquor License Act."

Since said committal and pending the result of this motion, the applicant has been only nominally in custody.

The matter comes before me on motion for a writ of

Judgment. *habeas corpus*, and by request and consent of all parties I am to deal with it finally in the first instance.

J.

If the applicant had the right to maintain and rely on his objection, it is quite clear that the objection was sufficiently taken, and I am also clearly of the opinion under the circumstances that his objection is likely to be well founded, for by sec. 57 of the Liquor License Act, it is an offence (with certain exceptions) to be found in a bar-room during prohibited hours.

Therefore his declaration on oath before the magistrate, repeated in his affidavit, that he believes the answer will tend to criminate him will protect him from answering unless, as is contended by the prosecution, the language of sec. 115 of the Liquor License Act is of force sufficient to abrogate a rule of great antiquity, and which rule has been universally recognized by all British Courts whether exercising civil or criminal jurisdiction.

Section 115 is as follows: "In any prosecution under this Act the Justice, Justices, or Police Magistrate trying the case may summon any person represented to him or them as a material witness in relation thereto; and if such person refuses or neglects to attend pursuant to such summons, the Justice, Justices, or Police Magistrate may issue his or their warrant for the arrest of such person; and he shall thereupon be brought before the Justice, Justices or Police Magistrate, and if he refuses to be sworn or to affirm, or to answer any question touching the case, he may be committed to the common gaol of the county, there to remain until he consents to be sworn or to affirm and to answer."

Any statute which appears to take away, change or diminish a common law right should be strictly construed: Endlich on the Interpretation of Statutes, sec. 127; Maxwell's Interpretation of Statutes, 3rd ed., 399.

Under the Evidence Act, R. S. O. ch. 73, there seems to be no escape for the defendant or his or her wife or husband: *Regina v. Fee* (1887), 13 O. R. 590; *The Queen v. Nurse* (1898), 2 Can. Crim. Cas. (Tremear) 57, where the learned senior Judge of the county of York discusses the

subject fully and expresses the opinion that, "Any other witness except the defendant, his wife or husband (as the case may be), can, however, avail himself of the protection afforded by sec. 5 of the Evidence Act (Ont.), and if the answer to the question would tend to subject him—the witness—to criminal proceedings, or to a prosecution for a penalty, he can decline to answer." Judgment.
Falconbridge,
J.

With this opinion I agree. The refusal "to answer any question touching the case" in section 115, must mean any question which may be lawfully put and which the witness is otherwise bound to answer.

It is suggested that without the aid of the section the magistrate might not be able to enforce the answering of proper questions.

Having come to this conclusion it is unnecessary further to consider or criticise section 115, but does it authorize the committal of a witness for refusal to be sworn or to answer until after he has been brought before the justice on a warrant for refusing to attend pursuant to summons? Here he attended in obedience to the summons.

There will be an order for the discharge of Charles H. Askwith from the common gaol of the county of Carleton, or from the custody of such other person as may have him in charge.

No order as to costs as none were asked for by or against the magistrate.

G. A. B.

**IN RE THE ONTARIO INSURANCE ACT, AND THE SUPREME
LEGION SELECT KNIGHTS OF CANADA.**

Benevolent Societies—Incorporation of—By-laws—Amendments to Constitution—Liability to Pay—Assessments—Suspension—Withdrawal from Membership—Notice of Assessments—R. S. O. 1877, ch. 167—R. S. O. ch. 211, ch. 203, sec. 164.

A Benevolent Society incorporated under R. S. O. 1877, ch. 167, attached to the declaration which they filed under section 2 (5), a printed book stated to contain a copy of the constitution and by-laws by which the said Society was to be governed :—

Held, that the constitution and by-laws thus included in the declaration became by virtue of sec. 2 (1) (R. S. O. ch. 211, sec. 3 (1)), a part of the organic law of the Society, and changes made in the by-laws in accordance with the provisions of such constitution were valid and binding.

Held, also, that the mere fact of a person being a member of such a Society so constituted or of its beneficiary department, raises no implied contract that he will pay the dues and assessments which according to the rules of the Society afterwards become due; and that in the absence of such a contract on his part, there is no obligation to pay for breach of which an action against him will lie.

No such contract is implied in an agreement by an applicant for a beneficiary certificate, contained in his application, that compliance on his part with all the laws, regulations, and requirements which were or might be thereafter enacted by the order was the express condition on which he was to be entitled to participate in the beneficiary fund.

Liabilities may be imposed upon members by changes in the constitution and by-laws of the Society, which did not exist when they became members.

R. S. O. ch. 203, sec. 164, does not create a personal liability to pay assessments where none exists apart from it.

Held, also, that a suspended member is none the less a member of the Society; and where there is a personal liability on his part to pay dues or assessments, that liability continues notwithstanding the suspension, not only as to dues and assessments payable at that time, but also as to those which become payable during the suspension and before, by the operation of the rules, his default results in his ceasing to be a member.

Held, also, that all conditions prescribed by the constitution in order to withdrawal from membership must be rigorously observed.

Notice to members of an assessment is not sufficiently proved by the fact that the official paper of the Society was distributed by a distributing agency, without proof of delivery by the latter to the individual members.

Certain clauses in the constitution of the Society construed.

Statement. **THIS** was an appeal from the report of the Local Master at St. Catharines in respect to the list of contributories settled by him in these proceedings, which were for the

compulsory liquidation of the Supreme Legion of the Select Knights of Canada.* Statement.

The appellants were persons placed upon the list of contributories, and the facts are sufficiently stated in the judgment.

The appeal was argued on March 7th and 8th, 1899, before MEREDITH, C. J.

W. R. Riddell, for several of the appellants, contended that any changes in the by-laws must, to be valid, have been made in accordance with R. S. O. 1877, ch. 167, sec. 4, the Act under which the Society was incorporated, that is by the Society; the changes here were not made by the Society but by representatives, who were no more the Society than a board of directors are the company: *King v. Westwood* (1830), 7 Bing. 1, 2 Dow. & Cl. 21; *Stephenson v. Vokes* (1896), 27 O. R. 691; *Rex v. Cutbush* (1768), 4 Burr. 2204; *King v. Lyme Regis* (1779), 1 Doug. 149, 158; *Company of Felt Makers v. Davis* (1797), 1 B. & P. 98; R. S. O. ch. 211, sec. 5; *Dewhurst v. Clarkson* (1854), 3 E. & B. 194, and the cases following on it, depend on the English legislation which is different. There was no direction here given by the registrar to change the rules under 58 Vict. ch. 34, sec. 4; R. S. O. ch. 203, sec. 163, sub-sec. 3. As to there being no personal liability on members to pay dues and assessments apart from express contract: *Re Roden and The City of Toronto* (1898), 25 A. R. 12; *Cerri v. Ancient Order of Foresters* (1898), 25 A. R. 22, 28; *Long v. Ancient Order of United Workmen* (1898), 25 A. R. 147, 154; *Baker v. Forest City Lodge I. O. O. F.* (1897), 28

* The Society had been originally incorporated in 1883 under the name of "The Grand Legion of Ontario, Select Knights of the Ancient Order of United Workmen." In 1889 an order was obtained from a Judge of the High Court, under R. S. O. 1887, ch. 172, sec. 19 (1), changing the name to "The Grand Legion of Ontario, Select Knights of Canada." In 1894 the name was further changed by order of the Lieutenant-Governor to "The Supreme Legion, Select Knights of Canada."—R&P.

Argument. O. R. 238, 24 A. R. 585, were cited. It was further contended, in reference to points arising in the case of certain of the appellants, that a suspended member should not be obliged to pay anything towards the Society unless reinstated; that no obligation to pay an assessment arose until proof that actual notice of it had been given, or the official paper mailed to the member, he being at the time a member in good standing; that the delivery up of a member's certificate was not necessary to his withdrawal; and that members were not bound by changes made in the constitution and by-laws subsequently to their becoming members.

B. N. Davis, Charles Elliott, and Gideon Grant, for certain other appellants.

J. H. Hunter, for the Registrar of Friendly Societies, contended that the Society was clearly founded on a representative system, referring to Thompson's Commentaries on Private Corporations, sec. 5987, as to the way the constitutions of these assessment companies were to be read; that the members were clearly under obligation to pay the assessments; that the constitution must be read as though the members covenanted with each other so to do: *Raggett v. Bishop* (1826), 2 C. & P. 343; *Raggett v. Musgrave* (1827), 2 C. & P. 556; *Delauney v. Strickland* (1818), 2 Stark. 416; *Cockerell v. Aucompte* (1857), 2 C. B. N. S. 440; *Finch v. Oake*, [1896] 1 Ch. 409; *In re Duty on Estate of New University Club* (1887), 18 Q. B. D. 720; *Burridge v. Row* (1842), 1 Y. & C. (Ch.) 183; *In re Leslie, Leslie v. French* (1883), 23 Ch. D. 552; *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234; *In re Earl of Winchelsea's Policy Trusts* (1888), 39 Ch. D. 168. He maintained that the appellants were resting on very recent American law: *Leyman v. Clark* (1898), 27 Ins. L. J. 745; *Ellerbe v. Barney* (1894), 119 Miss. 632, which was at variance with earlier cases; *Corn v. Mutual Assurance Society* (1810), 6 Cranch 192; *New York Life Ins. Co. v. Statham* (1876), 93 U. S. 24. As to the retroactive application of rules: *Baker v. Forest City Lodge I. O. O. F.*

Argument.

(1897), 28 O. R. 238, 24 A. R. 585; *Wilson v. Miles Plating Building Society* (1887), 22 Q. B. D. 381 n; *Rosenberg v. Northumberland Building Society* (1889), 22 Q. B. D. 373; *Smith v. Galloway*, [1898] 1 Q. B. 71. A distinction must be drawn between suspension of a certificate and termination of membership: *Oates v. Supreme Court of Foresters* (1884), 4 O. R. 535, 548; *Dale v. Weston Lodge* (1897), 24 A. R., at pp. 362, 366; *Long v. Ancient Order of United Workmen* (1898), 25 A. R., at p. 152; and the suspension of a certificate should not interfere with liability: *Currick v. North British Building Society* (1885), 22 Scot. L. R. 833; *Harris v. Dry Dock Co* (1859), 7 Gr. 450; *The Marmora Foundry Co. v. Jackson* (1852), 9 U. C. R. 509; *The Marmora Foundry Co. v. Boswell* (1850), 1 C. P. 175; *The Marmora Foundry Co. v. Murney* (1850), 1 C. P. 29; *Spackman v. Evans* (1868), L. R. 3 H. L. 171. Notice of assessment by publication was good: *The Marmora Foundry Co. v. Boswell* (1850), 1 C. P., at p. 185; *In re Canadian Relief Society, Patterson's Case* (1895), 15 C. L. T. 216.

D. F. Macwatt, for the receiver, referred to *Horton v. The Provincial Provident Institution* (1889), 17 O. R. 361; *Hæfner v. The Canadian Order of Chosen Friends* (1898), 29 O. R. 125; R. S. O. ch. 203, sec. 91 (3), 143.

Riddell, in reply.

July 20th, 1899. MEREDITH, C. J. :—

This is an appeal by the persons settled on the list of contributories from the report of the Local Master at St. Catharines, dated November 1st, 1898, made under the authority of sub-sec. 3 of sec. 189, and sub-sec. 1 of sec. 192 of the Ontario Insurance Act (R. S. O. ch. 203), by which they are settled on the list of contributories in this matter.

It was conceded upon the argument that the report had been made under a misapprehension as to the case of the persons alleged to be contributories having been closed,

Judgment. and that there must be a reference back, and I was asked
Meredith, to deal with the various preliminary questions argued
C.J. before the Master as if he had made the special or interim report as to them, which according to the arrangement made by the solicitors who appeared before him it was intended that he should make.

The Society was incorporated under the provisions of the Revised Statute respecting Benevolent, Provident and other Societies, R. S. O. 1877, ch. 167; the declaration provided for by that Act having been filed with the Provincial Registrar on October 16th, 1883, when according to the provisions of sec. 2 (5) the persons who signed the declaration, their associates and successors became a body corporate and politic.

Annexed to the declaration is a printed book which is stated to contain "a copy of the constitution and by-laws by which the said Society or organization is governed" the Society, as the declaration also states, having been formed on May 24th, 1883, and "ever since been and still is in existence as an organized Society."

The first question raised by the appellants is as to certain changes which have been made or assumed to be made in the by-laws of the Society since its incorporation; these changes have been made by the action of representatives to the Supreme Legion at its biennial sessions in accordance with the provisions of the constitution as set out in the printed book to which reference has been made, and not at meetings of the members of the Society, which, according to the contention of the appellants, is the only body having power to pass by-laws or to alter, amend or repeal them, and as it is argued, the by-laws which the Supreme Legion assumed to pass are therefore unauthorized and ineffectual.

I agree with the conclusion which the Master has reached on this branch of the case. In addition to the reasons which he gives for that conclusion, there are others, all of which it is not necessary to mention, one of them alone being, in my opinion, conclusive against the argument of the appellants.

The Revised Statute provides that in addition to the particulars which it requires to be contained in the declaration, there may be included in it "such other particulars and provisions as the Society may think fit, provided the said particulars and provisions are not contrary to law:" section 2 (1).

Judgment.
Meredith,
C.J.

This provision clearly, I think, warranted the constitution and by-laws which were to govern the society being included in the declaration, and when so included made them a part of the organic law of the Society.

No difficulty is created by the use of the word "Society" in section 4; that section must be read in connection with the provisions of the declaration and there is nothing in it inconsistent with the Society being at liberty to exercise the powers conferred upon it by the section in conformity with the constitution and by-laws which were annexed to and form part of the declaration.

The next question to be considered is whether the members of the Society or of its beneficiary department are under any personal liability for the payment of the dues which became due or the assessments which were made after they were admitted as members of the Society or the beneficiary department of it.

I agree with the contention of the appellants that the mere fact of a person being a member of a Society constituted as the Society in question was, or of its beneficiary department, raises no implied contract that he will pay the dues and assessments which, according to the rules of the Society, afterwards become due, and that in the absence of a contract on his part to do so there is no obligation to pay for breach of which an action against him will lie.

The reason of the thing and the weight of authority in the American Courts support the statement of the law made by Mr. Bacon in his work on Benefit Societies and Life Insurance, 2nd ed., paragraphs 357 and 378, which in effect is that the liability to pay premiums or assessments depends upon contract, and there is a debt in respect of

Judgment. them only when there is an absolute promise to pay embodied in the contract.
Meredith,
C.J.

Some judges appear to treat benefit associations as standing in this respect on a different footing from life insurance companies as to which the law is on all hands conceded to be as stated by Mr. Bacon.

Two cases which Mr. Bacon treats as opposed to his view, *McDonald v. Ross-Lewin* (1883), 29 Hun 87, and *Smith v. Bown* (1894), 75 Hun 231, are really not so, there having been in both of them that which amounted to a contract by the member to pay the assessments as is pointed out as to the earlier of the cases by Chief Justice Black in *Ellerbe v. Barney* (1894), 119 Missouri, at p. 652.

In the last mentioned case, the Court which was composed of seven members, by a majority of one, held that there was a liability to pay.

It was perhaps sufficient to support the view of the majority of the Court that one of the by-laws provided that "upon the death of a member * * each member of the association at the time such death occurred may be assessed and shall pay * * "; but although this is pointed out by the Judge who delivered the judgment of the Court as imposing upon the members the liability to pay assessments as a debt or burden incident to membership, the decision is rested mainly on the proposition that having regard to the nature of the Society and the object of the beneficiary feature of it, there was implied from the terms of the certificate issued to the member, in which it was stated that the consideration for the Society's promise was a sum in cash "and the further sum to be paid by him to this Society * * of \$1.60 for each such death, as assessments therefor may be made so long as he may be a member thereof," and that the certificate was issued and accepted subject to the provisions of the articles of association and by-laws of the Society,—an obligation to pay the dues and assessments.

The minority, of whom Chief Justice Black was one, thought that even the strong language of the by-laws

which I have quoted was not sufficient, having regard to another of the by-laws which provided that a member failing to pay his assessment within a designated time should forfeit his membership in the association and all benefits therefrom, to make the contract otherwise than a unilateral one or to create any personal liability on the part of the member for the payment of assessments.

Judgment.
Meredith,
C.J.

In *Clark v. Lehman* (1895), 65 Ill. App. 238, it was held that "whether a member of a benevolent association is legally liable to pay assessments for death losses or whether the only recourse of the association in the event of his refusal to pay is to declare his certificate void and cancel his membership, depends upon the contract between the member and the association" and that "in the absence of an express stipulation to pay assessments the contract is unilateral and the member may pay or decline to pay at his option: the only effect of his default is to relieve the association of its obligation to him."

It was held also that the terms of the contract were to be ascertained not from the certificate alone, but that the application for membership and the constitution and by-laws of the association and the certificate were to be considered together as though all were embraced in a single instrument.

Mr. Hunter strenuously insisted that the law was not correctly laid down in *Clark v. Lehman*: that that case was opposed to the whole line of American authority, and that such a decision by the Courts of this country would be fatal to the successful carrying on of such associations as the Society in question which must depend upon the assessments collected from their members to pay the obligations which they have assumed by the beneficiary certificates they have issued.

I do not agree with that view, though it finds some support in what was said by the learned Judge who delivered the judgment of the Court in the Missouri case to which I have referred.

The law is, I think, correctly laid down in *Clark v.*

Judgment. *Lehman.* The decision is supported by the great weight
Meredith, of American authority, and it is a sufficient answer to the
C.J. argument as far as it is one *ab inconvenienti* that there is nothing to prevent a Society which desires to have the security of the personal liability of its members for the payment of assessments from requiring persons desiring to become members to undertake that liability or from providing by its by-laws that it shall attach to all who become members.

I would refer also to *The Chicago Mutual Life Indemnity Association v. Hunt* (1889), 127 Ill. 257, particularly to what is said by Mr. Justice Bailey, at p. 277, and to *Vick v. Clark* (1898), 77 Ill. App. 599, and *Fulton v. Stevens* (1898), 74 N. W. Rep. 803.

What then is the position of members of the Society I have to deal with, as to liability for assessments?

The only document required to be signed by an applicant for membership either in the order or in the beneficiary department, was the application for membership. The form of application for membership contains a promise on the part of the applicant, if elected, of faithful obedience to all laws, rules and regulations governing the organization, and the form of application for "beneficial certificate" as it is called, contains an agreement on the part of the applicant "that compliance on his part with all the laws, regulations and requirements which are or may be hereafter enacted by the order is the express condition upon which I am to be entitled to participate in the beneficiary fund * * *."

I find nothing in these forms or in the constitution and by-laws prior to the amendments of 1896 which provide that there is to be any personal liability on the part of the members for the payment of or anything in terms requiring them to pay the assessments, nor is there in any of them anything inconsistent with its having been the intention that making payment was to be optional and the loss of right the only consequence of failure to pay; indeed the language of the form of application for the

"beneficial certificate" would appear to have been chosen because that was intended to be the position of the members of the Society.

Judgment.
Meredith,
C.J.

It was by the amended constitution and by-laws of March 11th, 1896, which came into force on July 1st following, that for the first time it was provided in terms that the member should pay either dues or assessments.

By section 259 it is provided that each member "shall pay" to his legion certain periodical sums as dues, and by section 321 provision is made that every member "shall pay" the amount due for assessments within thirty-one days from the date of them,—the amounts of which are fixed by section 292.

It follows, therefore, that members of the Society, at the date when the new constitution came into force, are liable for the payment of the dues which became payable after that time, and while they continued to be members, and for assessments made from the same date so long as they remained members of the beneficiary department.

A suspended member is none the less a member of the Society, and where there is personal liability on the part of the member to pay dues or assessments, that liability continues notwithstanding the suspension, not only as to dues and assessments payable at the time of the suspension, but also as to those which become payable during the suspension and before, by the operation of the rules his default results in his ceasing to be a member,—such is the effect of the decision of Mr. Justice Robertson in the *Patterson* case (1895), 15 C. L. T. 216, which is binding on me, and in which I agree.

I agree with the learned Master's view as to the position of a member who, not being in default, gave verbal notice of withdrawal from the Society, but did not surrender his beneficiary certificate in writing, and release all claim to it, and receive through his legion a certificate of withdrawal issued by the supreme recorder: section 290.

The right of the member to withdraw is conditional on his doing all that is mentioned in section 290 as necessary

Judgment. on his part to be done. No one of these things is a mere
Meredith, formality, but each is, if not necessary, very desirable for
C.J. the security of the Society, in order that it may have in every case the proof under the hand of the member that its liability under the certificate is at an end.

It is unnecessary for me to express any opinion as to whether lapse of time and conduct of the Supreme Legion might not, in some circumstances, estop the Society from alleging that one who had done only what was done in the cases I have mentioned was still a member. It will be time enough to deal with such a case when it arises, and the facts necessary for its determination are before the Court.

I have omitted to refer in its place to the objection raised by some of the appellants, that they are not bound by the changes made in the constitution and by-laws after they became members, as far, at all events, as those changes imposed upon the members a liability which did not exist at the time they became members.

The case of *Baker v. Forest City Lodge, I.O.O.F.* (1897), 28 O. R. 238, affirmed in appeal 24 A. R. 585, is conclusive against the appellants on this point.

The provisions of section 164 of the Insurance Act, R. S. O. c. 203, seem to have been thought by the Master sufficient to create a personal liability to pay assessments where none existed apart from them, but I did not think that that is the effect of the section. It was intended to be in ease of the member, and ought not to be held to create a liability when none existed, but as limiting the liability which by his contract the member might be under. This is plain, I think, from the language of the section which speaks of the liabilities of the member "under his contract."

It is also objected by the appellants that in any case they are not liable to contribute in the liquidation in respect of the per capita tax. This, I understand, to have reference to the per capita tax mentioned in section 87, which, in providing for the revenue of the Supreme Legion,

enumerates as one source of it a per capita tax of \$1 per annum, payable semi-annually, for each member of the order in good standing, not under the jurisdiction of a Grand Legion. This tax, according to section 90, the legion is required to remit to the Supreme Legion at the times mentioned in the section.

Judgment.
Meredith,
C.J.

Similarly, a per capita tax of not less than thirty cents for each member goes to make up the revenue of the Grand Legion, though I do not find it provided by whom the payment of it is to be made, unless it be inferentially by section 399, where, among the causes for suspension of a subordinate legion is enumerated non-payment of its per capita tax, or other obligation to its Grand or the Supreme Legion. It was intended, I apprehend, that like the other per capita tax it should be paid by the legion.

I do not see how this tax can be charged against the member; it is not made payable by him, but is clearly, as to that to be paid the Supreme Legion, and, in my opinion, also as to that to be paid the Grand Legion, payable by the subordinate legion and not by the individual members.

The objection that the claim of the Society to recover arrears of dues and assessments is barred by section 310* is untenable. The group of sections of which it is one has reference to claims against the Society, and though standing by itself the language of section 310 would probably extend to claims by the Society against a member, it cannot, standing as one of the group of sections I have mentioned, in my opinion be so construed.

I have not said anything as to the position of persons admitted to the beneficiary department when they had passed the maximum age at which admission could properly under the constitution take place. The only case dealt with upon the reference in which this question was

* This has reference to section 310 of the constitution which was as follows: No action in law or in equity in any Court shall be brought or maintained in any case or claim arising out of any membership or beneficiary certificate unless such action is brought within one year from the time when the right of such action accrues.—REP.

Judgment. presented for consideration was that of Ker, and agreeing
Meredith, as I do with the reasons given by the Master for holding
C. J. as he did that Ker was properly admitted, I refrain from
expressing any opinion on the hypothetical case I am asked
to consider.

Where a suspended member has applied for reinstatement within the time limited by the rules, and his application has been refused either because he was unable to pass the required medical examination, or by reason of the adverse vote of the legion, or because of his age, he is not, in my opinion, liable for assessments made after the refusal, which had the effect, I think, of practically terminating the applicant's membership in the beneficiary department.

I am unable to agree with the opinion of the Master that notice to the member of an assessment was sufficiently proved in those cases in which the official paper of the Society was said to have been distributed by an agency for distribution in Toronto. No evidence was, as I understand it, given of the delivery to the member by the distributing agency. Proof such as was given as to the arrangement with the agency and the course of business was insufficient, and there is no principle that I am aware of which warranted the Master in assuming that because the paper in most cases reached the members,—if that were proved,—it reached any particular member who set up want of notice.

It is unnecessary to consider at this stage what the effect of the failure to prove the notice may be, possibly it may operate as a two edged sword.

I have not dealt with some of the questions which I was asked by the appellants' counsel to express an opinion upon, but I have dealt with all that are properly before me for adjudication; those which are based upon states of fact merely hypothetical and which may not arise upon the reference, I have not thought it proper to pass upon.

The report will therefore be set aside and there will be a reference back to the Master to reconsider the case of

the alleged contributories, with a direction to him in doing so to have regard to the opinions I have expressed upon the various questions with which I have dealt, and there will be no costs of the appeal to either party, each having succeeded in part and failed in part in his contentions.

Judgment.
Meredith,
C.J.

A. H. F. L.

[DIVISIONAL COURT.]

IN RE ALEXANDER.

Appeal — Executors and Trustees—Fixing Compensation — Appeal from Surrogate Court Judge—R. S. O. ch. 59, sec. 36—R. S. O. ch. 129, sec. 43.

By virtue of R. S. O. ch. 59, sec. 36, an appeal lies to a Divisional Court from an order of a Surrogate Court Judge allowing compensation to an executor under the Trustee Act, R. S. O. ch. 129, sec. 43.

THIS was an appeal from the judgment of the Surrogate Court Judge of the county of Bruce of March 28th, 1899, in so far as he thereby refused to allow compensation to the executors of one Alexander, deceased, for their pains, trouble and time expended in and about the estate of the deceased as such executors, and also in so far as he disallowed a claim of one of the executors for services rendered to the deceased in his lifetime. Statement.

The appeal was argued on June 14th, 1899, before BOYD, C., and MEREDITH, J.

Shepley, Q.C., and O'Connor, Q.C., for the residuary legatee, contended by way of preliminary objection that the Surrogate Court Judge was *persona designata* to adjudicate on the matter of compensation, and that there was no appeal given in the statute: R. S. O. ch. 129, sec. 43; *Re Fleming* (1886), 11 P. R. 272, 426; *Re Toronto, Hamilton & Buffalo R. W. Co. and Hendrie* (1896), 17 P. R. 199. Nor

Argument. is any appeal given by the Surrogate Courts Act, R. S. O. ch. 59, sec. 36, for there was not here "any matter or cause under this Act" within the meaning of that section, nor any "order, sentence or judgment," or "determination in point of law." The appeal given is confined to questions where the contest is over the right to administer, or to continue to administer.

C. J. Holman, for the executors, referred to *Re Williams* (1896), 27 O. R. 405, and contended that 59 Vict. ch. 20, (O.), recognizes that there is such an appeal according to the course of the decisions; that C. S. U. C. ch. 16, sec. 66, shewed the clause as to compensation to executors did then appear in the Surrogate Courts Act, and the right of appeal was given by section 26; with that clause in the Act; and that there was a cause in the Surrogate Court.

Shepley, in reply, referred to R. S. O. ch. 1, sec. 8, subsec. 57.

September 1st, 1899. BOYD, C.:—

In the Surrogate Courts Act of 1858, 22 Vict. ch. 93, the provisions as to allowances being made to executors by the Surrogate Judge and as to an appeal from any order of the Surrogate Court are first found within the compass of one Act as sections 20 and (part of) 47. They are thence carried into the old Consolidated Statute of Upper Canada and appear in the Surrogate Courts Act, as sections 26 and 66 of ch. 16.

In the revision of 1877, these two sections became separated, the section 26 as to appeal is changed by making the Court of Appeal instead of the Court of Chancery the appellate court, and is found in the Surrogate Court Act ch. 46, as sec. 31, and the other section as to allowances is found in the Trustee and Executors Act, ch. 107, as sec. 41. By 40 Vict. ch. 6, sec. 10 (O.), it was enacted as to that revision, that the said Revised Statutes shall not be held to operate as new laws but shall be construed and have effect as a consolidation and as declara-

tory of the law as contained in the repealed Acts for which the Revised Statutes are substituted.

Judgment.
Boyd, C.

The effect of that was to leave intact the right of appeal upon any question of allowances or compensation to executors though it might not technically be an order in any matter under the Surrogate Act, that Act being separated in the new distribution of subjects and the provisions being divided and classified differently in the new revision. The same division and distribution of the Surrogate Act was carried on, in and through the revision of the next and the last decennial periods so that now the two clauses are found in R. S. O. 1897, ch. 59, sec. 36, where the appeal is to the High Court, and the other section is in ch. 129, sec. 43. But both are of one original and are still *in pari materia*, and are to be read together as forming one subject-matter. Such has been the course of practice and not till now in the face of frequent appeals from allowances made by the Surrogate Judge has the objection been made that no appeal lies, that the Trustees and Executors Act, R. S. O. ch. 129, constitutes a new officer by making the Surrogate Judge a *persona designata* from whom is no appeal.

The principle as to the construction of consolidated statutes is well stated by Lord Westbury in *Boston v. Le-lievre* (1870), 6 Mo. P. C. N. S. at p. 34, in these pertinent words: "The Court of Appeal in Lower Canada is the creation of statute and the subjects upon which appeal lies to that Court are defined with reasonable clearness. The jurisdiction of the Court existed before the Consolidated Statutes, but the Consolidated Statutes annulled all the antecedent statutes on the subject. The Consolidated Statutes may be treated as one great Act, and their lordships think it would not be wrong to take the several chapters as being enactments which are to be construed collectively and with reference to one another just as if they had been sections of one statute instead of being separate Acts." See also *per* Denman, J., in *Mitchell v. Simpson* (1889), 23 Q. B. D., at p. 376, and *In re Budgett*

Judgment. (1894), 42 W. R. 551 : see, also, *Williams v. Roy* (1885),
Boyd, C. 9 O. R., pp. 539, 540.

The preliminary objection should be overruled, and with costs in the result to the appellants.

MEREDITH, J. :—

Mr. Shepley's objections to our jurisdiction were (1) that the making of the allowance to the executor was an act of the Judge as *persona designata* and not a proceeding in Court, and (2) and that in any case no appeal lies.

But it still appears to me that it is enough to say, as was said during the argument, that, if these objections be valid, then the numberless appeals taken and entertained, against allowances to executors and trustees under the Act, and the exhaustive judgments upon the merits given in some of them, were entirely without jurisdiction and nugatory, appeals going through the several courts of this Province, beginning soon after the passing of the Act and continuing down to the former appeal allowed in this very case, and this appeal. If these objections were arguable they would have been before made, and if ever made must have been overruled.

It seems to me quite too late to contend now that no appeal lies, and none the less so as the matter is one in which an appeal in some cases certainly ought to lie.

But, apart from the invariable practice extending over so many years and the various revisions and alterations of the Acts in the knowledge of it, upon the fair interpretation of the Act, as it now stands, neither objection should, in my judgment, prevail.

Power is given by the Act (R. S. O. ch. 129, sec. 40) to the High Court or a Judge, or, upon a reference to him, to any Master or Referee of the High Court, in effect, to make a fair and reasonable allowance to certain trustees, executors, administrators and guardians, for their services as such.

I cannot doubt that that allowance must be made in a proceeding in the High Court ; that it must be an act of

the Court itself. The High Court which may make the Judgment order for the allowance can hardly be *persona designata*, Meredith, J. and if not how can its Judge, Master or Referee?

The 41st section does not necessarily conflict with this view: the words "although the trust estate is not before the Court in any action" rather favours it: the 40th section is not expressly limited to proceedings in an action.

Then by section 43 the like power as to executors, administrators, and trustees, acting under a will or letters of administration, is given to "the Judge of any Surrogate Court."

Can it be fairly contended that the order if made by the latter Judge is not to be appealable, whilst if made by a superior Court or Judge it is to be appealable?

There seem to me to be very good reasons for overruling the first objection.

The other objection, if standing alone, would be much more formidable; but considering that the allowance must be made in a proceeding in the Surrogate Court, and by an order of that Court, an appeal is expressly given by the 36th section of the Surrogate Courts Act, R. S. O. c. 59, unless the latter part of the section prevents it. But it requires no great ingenuity to meet the argument based upon that, for it may be said that that limit applies only in cases in which property, goods, rights or credits are affected by the order appealed against: see *Cox v. Hakes* (1890), 15 App. Cas. 506; or that the sum which, by the order of the Court, the executor is allowed to take from the estate and effects, etc., of the testator, come to his hands to be administered, as compensation for his services, may not improperly be said to come under the definition of property, goods, chattels, rights or credits to be affected by the order; and so an appeal lies, if the amount involved in the question of compensation exceeds \$200. The latter answer being in my judgment the better one.

I would overrule the first objection; and also the second, if the amount involved exceeds \$200.

[DIVISIONAL COURT.]

GALLAGHER V. GALLAGHER.

County Court Appeal—Order of Judge—Finality.

An order of the Judge of a County Court discharging the defendant from arrest under a *ca. sa.* is not in its nature final within the meaning of sec. 52 of the County Courts Act, R. S. O. ch. 55, and an appeal does not lie therefrom.

Statement. AN appeal by the plaintiff from an order of the Judge of the County Court of Frontenac, in an action in that Court, discharging the defendant from arrest under a writ of *capias ad satisfaciendum*.

When the appeal came on for hearing on the 6th September, 1899, before a Divisional Court composed of MEREDITH, C. J., and ROSE, J., *C. J. McCabe*, for the defendant, asked to have the hearing adjourned.

THE COURT raised the point that the order appealed against was not in its nature final, but merely interlocutory, within the meaning of sec. 52* of the County Courts Act, R. S. O. ch. 55, and therefore the appeal did not lie.

Kilmer, for the plaintiff, contended that the Judge had no power to make an order discharging the defendant except under the Indigent Debtors Act: *Gossling v. Mc-*

*52.—(1) An appeal shall also lie to a Divisional Court of the High Court of Justice, at the instance of any party to a cause or matter from every decision made by a Judge of a County Court under any of the powers conferred upon him by any Rules of Court or any statute, unless provision is therein made to the contrary; and from every decision or order made by a Judge of a County Court sitting in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts and proceedings against garnishees; and from every decision or order made in any cause or matter disposing of any right or claim, provided always that the decision or order is in its nature final and not merely interlocutory.

Bride (1897), 17 P. R. 585: and the order must, therefore, be taken to have been under that Act; and being so, it was an order in its nature final. He also relied on *Baby v. Ross* (1892), 14 P. R. 440. Argument.

Cur. ad. vult.

October 9, 1899. MEREDITH, C. J. :—

This is an appeal by the plaintiff from an order of the Judge of a County Court, in a County Court action, discharging the defendant from close custody under a writ of *capias ad satisfaciendum*. The question raised is whether it was competent to appeal from such an order as that. We have come to the conclusion that it was not.

In the case of *Baby v. Ross* (1892), a decision of the Court of Appeal, reported in 14 P. R. 440, it was held that the proviso to what is now sec. 52 of the County Courts Act, which was then sec. 42, in these words, "provided always that the decision or order is in its nature final and not merely interlocutory," control, not only the portion of the section which immediately precedes the proviso, but the whole section—"An appeal shall also lie to a Divisional Court of the High Court of Justice, at the instance of any party to a cause or matter from every decision made by a Judge of a County Court under any of the powers conferred upon him by any Rules of Court or any statute, unless provision is therein made to the contrary."

In that case reference is made to an unreported case, a decision of the Court of Appeal, *Armstrong v. Black*, decided on the 14th October, 1884, in which the Court quashed an appeal from an order dismissing an application to discharge a defendant who had been arrested upon a *ca. re.*

There is also a case of *McPherson v. Wilson* (1890), 13 P. R. 339, in which an appeal in a County Court action was quashed. The order there was one striking out the jury notice, and it was held that that was not an appealable

Judgment.

Meredith,
C.J.

order. It was contended on the part of the appellant that the order was an adjudication upon his statutory right to have a jury. The Court held otherwise, and decided that no appeal lay.

We think, therefore, that, governed by these cases, this appeal must be quashed. And it is perhaps not unsatisfactory to find that the decision is in accordance with the justice of the case, because the order upon which the writ of *capias ad satisfaciendum* was issued was plainly insufficient for that purpose.

The appeal will be quashed, with costs as of a motion to quash.

ROSE, J. :—

I think upon the argument we had no doubt, but reserved judgment to consider the case of *Baby v. Ross* (1892), 14 P. R. 440, which it was urged was a decision in the appellant's favour. I agree that the order must go as stated.

E. B. R.

RE GEORGE SHUNK ESTATE.

Will—Specific Bequest to Widow—Dower—Election.

An estate consisting of realty and personalty and amounting to over \$10,000, was, after a direction to pay the debts, funeral and testamentary expenses, and after a specific devise of certain land, devised by the testator to his executors in trust to sell and convert into money, and out of the proceeds to pay to his widow \$3,000 for her own use absolutely, and to divide the remainder among certain nephews and nieces:—

Held, that the widow was not put to her election, but was entitled to her dower in addition to the bequest.

Amaden v. Kyle, 9 O. R. 439, distinguished.

THIS was an application by the executors of the will of George Shunk, deceased, upon an originating notice under Rule 938, for the construction of the will, and for the determination of the following questions arising thereunder, namely, whether Jane M. Shunk was entitled to dower out of the real estate of the deceased in addition to the legacy of \$3,000 given to her; or was she obliged to elect whether she would take the legacy or dower out of the realty. Statement.

The testator by his will (which was dated the 27th August, 1895), after a direction that his debts, funeral and testamentary expenses, should be first paid out of his estate and a specific devise of certain lands to one Hill, devised and bequeathed all his real and personal estate except the specifically devised land, to his executors in trust to "sell and dispose of the same as soon after my decease as the same can, in my executors' opinion, be sold to advantage, not exceeding the space of two years thereafter, and convert such into money; and of the proceeds, firstly, pay to my wife, Jane M. Shunk, the sum of \$3,000, which I hereby devise and bequeath to her for her own use absolutely; and, secondly, divide the remainder thereof, after payment of all costs and expenses, equally between, and pay the same in equal amounts, to my hereinafter named relatives, namely" (naming several nephews and nieces), "to and for their own use respectively."

Statement. "The real estate I at present own, other than what is hereinbefore mentioned, is composed of" (describing it).

"In the event of the above named legatees or devisees predeceasing me leaving a child or children, I direct that the child or children of such deceased parent shall stand in such parent's place, and be entitled to receive what the parent would have received if he or she had been living at my decease. If such deceased parent leaves more than one child surviving, then such children to share equally between them their deceased parent's share."

And he appointed executors of his will.

On the 11th September, 1899, the matter was argued.

Marsh, Q. C., for the widow.

W. R. Cavell, for the executors.

W. R. Riddell, for the adult beneficiaries.

F. W. Harcourt, for the infant beneficiaries.

September 14th, 1899. ROSE, J.:—

"Five grounds were taken by Mr. Riddell upon which to base an argument that the widow was bound to elect. The first was, that looking at the value of the estate the provisions of the will were inconsistent with the widow's right to dower and the provision made for her; secondly, that the real and personal estate were devised to the executors in trust to sell, and that the blending of such estates for the purpose of carrying out the trusts of the will, among which was the one to pay \$3,000 to the widow, was inconsistent with the widow taking the benefit of the provision and also her dower; thirdly, that the lands were specifically devised by description; fourthly, that the case came within *Amsden v. Kyle* (1884), 9 O. R. 439, 441; *Re Quimby, Quimby v. Quimby* (1884), 5 O. R. 738; and, fifthly, that there was an implied power to lease.

The principle to guide me is laid down in *Parker v. Sowerby* (1853), 1 Drew. 488, at p. 492, as stated by Vice-Chancellor Kindersley: "In all the decisions, the general

rule recognized is, that it is not sufficient to collect an intention that the testator does not mean his widow to have her dower, but you must find an intention so to dispose of his estate that her claim to dower would be inconsistent with that disposition."

Judgment.

Rose, J

Looking at the inventory, I find that the property, real and personal, was valued at \$10,789, the estate, therefore, was ample to pay thereout \$3,000, to the widow, and provide for the other benefits. I see nothing, therefore, in the value of the estate which is inconsistent with the widow's claim to dower.

As to the second ground: As has been said, the property, real and personal, was devised to the executors in trust to sell, and out of the proceeds to pay the wife \$3,000, and to divide the remainder among certain persons named. It was held also in *Parker v. Sowerby*, as the result of the decisions, that "a devise to trustees in trust for sale, is not inconsistent with the widow's right to dower;" and I find no case which says that a blending of the realty and personalty makes any difference.

I find this proposition laid down in Bishop on the Law of Married Women, vol. 1, par. 378:—"Sixthly, a devise of the husband's whole estate upon trust to sell it, and apply the proceeds in a specified manner, including benefits to the wife, will not afford a presumption that these benefits were to be taken in lieu of dower," citing *French v. Davies* (1795), 2 Ves. Jr. 572, and *Ellis v. Lewis* (1844), 3 Hare 310, 313. The proposition laid down in *Ellis v. Lewis*, as stated in the marginal note is, that where the devise of land is in trust for sale, the mode of applying the proceeds does not affect the question whether the widow is entitled to her dower or is put to her election. The second ground is, therefore, untenable.

Even if the third ground were otherwise tenable, it is not supported by the facts. The devise is of "all my estate, real and personal." The will then stated that "the real estate I at present own, other than what is hereinbefore mentioned, is composed of"—setting out the lots by

Judgment.

Rose, J.

description. True, the testator states what land he then owned, but it did not follow that that would be the land which he would own at the time of his death. It is stated in *Ellis v. Lewis, supra*, by the Vice-Chancellor, Wigram, at p. 313: "I take the law to be clearly settled at this day, that a devise of lands, *eo nomine*, upon trust for sale, or a devise of lands, *eo nomine*, to a devisee beneficially, does not *per se* express an intention to devise the land otherwise than subject to its legal incidents, that of dower included."

Mr. Riddell urged that the devise of the lands in the form observed in this will indicated an intention to devise the lands so that it might be sold as land, and not subject to the widow's right to dower. The law is now as I think it was when stated by the learned Vice-Chancellor in *Ellis v. Lewis*, and this ground fails.

An examination of *Amsden v. Kyle*, 9 O. R. 439, following *Re Quimby, Quimby v. Quimby*, 5 O. R. 738, shews, I think, that this case is not at all within it. There the provision for the wife was a gift of one-third interest in all his real and personal estate, which the learned Chancellor said imported the same manner of division in the case of the land as in the case of the personalty, *i.e.*, a division of the entire property of each kind, which would be defeated if the dower were first subtracted from the realty. *Amsden v. Kyle* is explained in *Leys v. Toronto General Trusts Co.*, at p. 607. In the latter case the learned Chancellor says, at p. 605: "The testator blends the real and personal estate not for the purpose of its equal division, but in order to obtain an income out of which payments are to be made annually to his wife and other objects of his bounty, and the residue of such income to go equally during the life of his wife to his nephews and nieces," and there held that upon such a provision the wife was not bound to elect between her dower and the testamentary bestowments.

As to the fifth ground, even if an implied power to lease would be sufficient to put the wife to election, as would an express power to lease, I do not think here that there

is an implied power to lease. On the contrary, the direction is in terms "to sell and dispose of the same as soon after my decease as the same can in my executor's opinion be sold to advantage," and the testator gives a limit to the discretion by adding, "not exceeding the space of two years thereafter." The authorities to which I have referred shew that a devise upon trust to sell does not put the widow to any election, and here there is nothing more.

The result is that the widow is not put to her election.

I might have disposed of this case, I think, by reference to the case of *Leys v. Toronto General Trusts Co.*, 22 O. R. 605, but I have preferred to take up the grounds *seriatim*. I might also refer to *Laidlaw v. Jackes* (1879), 27 Gr. 101, especially the judgment of Blake, V.-C., at p. 108.

This is a case in which the parties, I think, were warranted in coming to the Court for an opinion, and the costs must be out of the estate.

G. F. H.

Judgment.

Rose, J.

RICKETTS ET AL.

V.

THE CORPORATION OF THE VILLAGE OF MARKDALE.

*Municipal Corporations—Negligence—Obstructions—Injury to Child
Playing on Highway.*

A child using a highway *merely* for the purpose of play is putting it to a use for which it was not intended, and cannot recover for injuries received while so using it due to obstructions on the highway.

An action brought by parents for the death of a child caused by being crushed between some timbers while playing on them, which were negligently piled on the side of a highway was dismissed.

Statement. THIS was an action brought by George Ricketts and Chloe Ricketts, the father and mother of James Edgar Ricketts, against the Corporation of the Village of Markdale, for damages for the death of their child who was crushed by some logs negligently left on the street, while playing there with some other children.

The action was tried at Owen Sound on the 19th and 20th of September, 1899, before FALCONBRIDGE, J., without a jury.

It appeared that some large sticks of square timber had been permitted by the defendants to be piled on the side of a street, near to and partly on the sidewalk, one at least of which extended on to the roadway; and that the child (who was seven years old) while playing on the timber was killed by one of the sticks swinging round, and crushing him as he fell between them.

A. G. MacKay, for the plaintiffs. The piling of the pieces of timber where they were and the loose and careless manner in which they were piled put the road out of repair: R. S. O. ch. 223, sec. 606; *Foley v. Township of East Flamborough* (1899), 26 A. R. 43, and cases cited there at p. 51; *Ferguson v. Township of Southwold* (1895), 27 O. R. 66; *Lay v. The Midland R. W. Co.* (1875), 34

L. T. N. S. 30. The timbers were so placed as to naturally invite children to walk on them, and the corporation are responsible for the result of the natural acts of the child in leaving the sidewalk to play upon them. The evidence shews that the child was of service to the parents in a market garden, and would have become more so as he grew up: *Franklin v. The South-Eastern R. W. Co.* (1858), 3 H. & N. 211; *Condon v. The Great Southern and Western R. W. Co.* (1865), 16 Ir. C. L. R. 415; *Dalton v. The South-Eastern R. W. Co.* (1858), 4 C. B. N. S. 296.

J. B. Lucas and W. H. Wright, for the defendants. The evidence does not establish that the services of this child of seven years of age were of any benefit to the plaintiffs, and the action cannot be maintained for nominal damages: *Boulter v. Webster* (1865), 11 L. T. N. S. 598. The law required him to attend school until he was fourteen, and were it obeyed he would be a source of expense rather than a benefit up to that age: R. S. O. ch. 296; *Burke v. Cork & Macroom R. W. Co.* (1879), 4 L. R. (Ir.) 682; *Sykes v. The North-Eastern R. W. Co.* (1875), 44 L. J. N. S. 191; *Hull v. The Great Northern of Ireland R. W. Co.* (1890), 26 L. R. (Ir.) 289; *Holleran v. Bagnell* (1879), 6 L. R. (Ir.) 333; *Mason v. Bertram* (1889), 18 O. R. 1. The timbers were not on the travelled part of the highway, and so it was not out of repair: even if they were they were not put there by the defendants, but by a third party: and the defendants are not liable for not removing them, as the only acts of nonfeasance for which a municipal corporation are liable are those which constitute nonrepair of a highway: *O'Neil v. Windham* (1897), 24 A. R. 341; *Municipality of Pictou v. Geldert*, [1893] A. C. 524; *Cowley v. The Newmarket Local Board*, [1892] A. C. 345; *Thompson v. The Mayor, etc., of Brighton*, [1894] 1 Q. B. 332; *The Sanitary Commissioners of Gibraltar v. Orfila* (1890), 15 App. Cas. 400; *Buchanan v. The Town of Galt* (1862), 15 C. P. 73. The evidence shews the boy was on the highway merely for the purpose of using it as a playground,

Argument.

Argument. and so the defendants are not liable: *Am. & Eng. Encyc. of Law*, vol. ix., p. 400; *Stinson v. City of Gardiner* (1856), 42 Mass. 248; *Blodgett v. City of Boston* (1864), 8 Allen (Mass.) 237; *Tighe v. City of Lowell* (1876), 119 Mass. 473. The boy's own acts and negligence were the cause of the accident; *Hughes v. Macfie* (1863), 2 H. & C. 744; *Mangan v. Atterton* (1866), L. R. 1 Ex. 239; *Bailey v. Neal* (1888), 5 Times L. R. 20.

A. G. MacKay, in reply, cited *Wolfe v. The Great Northern R. W. Co.* (1890), 26 L. R. (Ir.) 548; *Duckworth v. Johnson* (1859), 29 L. J. Ex. 25; *Hetherington v. The North-Eastern R. W. Co.* (1882), 9 Q. B. D. 160; *Smith on Negligence*, Bl. ed. 39, 101; *Dillon on Municipal Corporations*, 3rd ed. 725, pars. 731, 732; *Blackmore v. The Vestry of Mile End Old Town* (1882), 9 Q. B. D. 451; *Saulsbury v. The Village of Ithaca* (1883), 94 N. Y. 27; *Hill v. The City of Fond du Lac* (1882), 56 Wis. 242; *The City of Huntingdon v. Breen* (1881), 77 Ind. 29; *The City of Indianapolis v. Emmelman* (1886), 108 Ind. 530; *Mulligan v. Curtis* (1868), 100 Mass., at p. 514; *The City of Chicago v. Keefe* (1885), 114 Ill. 222; *Lynch v. Nurdin* (1841), 1 Q. B. 29; *Merritt v. Hepenstal* (1895), 25 S. C. R. 150; *Sangster v. The T. Eaton Co.* (1894), 25 O. R. 78; *Smith v. Hayes* (1898), 29 O. R. 283; *Lay v. The Midland R. W. Co.* (1875), 34 L. T. N. S. 30.

W. J. Hatton, appeared for a third party.

October 21st, 1899. FALCONBRIDGE, J.:—

With the exception of one element in this case which I shall mention hereafter, and which I consider to be fatal to plaintiffs' recovery, I find all the facts in issue in plaintiffs' favour, viz.: That the defendants, the corporation, negligently allowed square timbers to be piled near (and partly on) the sidewalk on Mill Street at the point in question, and were guilty of neglect and default in not causing said timbers to be removed from the highway, and that such negligence was the cause of the death of plaintiffs' child, James Edgar Ricketts.

I find specifically that one at least of the said timbers (the outer one) extended across the ditch and beyond the ridge or margin of grass at the edge of the roadway and out upon the part of the roadway usually driven on. Judgment.
Falconbridge,
J.

By reason of the age of the child and the other facts I find against the defendants on the issue of contributory negligence.

And I find that the deceased, James Edgar Ricketts, was able to perform and did perform valuable services of various kinds for the plaintiffs, and that they had a reasonable expectation of future benefit and profit from his services and his earnings.

And I assess the damages to the plaintiffs at the sum of \$400 in the event of their succeeding in the action.

I was not referred to and have not been able to find direct English or Canadian authority on the point which is, I think, crucial, and decisive against plaintiffs, viz., the fact that the child was not going out to school nor on any errand or business, but simply left his home about twenty minutes past seven p. m., his mother knowing that he was going out alone on the street to play. She says he had done this for two or three years and that the sidewalk and street were used generally as playgrounds. I refer, however, to Eversley on the Law of Domestic Relations, 2nd ed., 802; *Singleton v. The Eastern Counties R. W. Co.* (1859), 7 C. B. N. S. 287; *Hughes v. Macfie*; *Abbott v. Macfie* (1863), 2 H. & C. 744; *The Town of Portland v. Griffiths* (1885), 11 S. C. R. 333 (opinion of Sir Wm. Ritchie, C. J., at p. 338).

The law in the United States is well summed up in the Am. & Eng. Encyc. of Law, 1st ed. vol. ix, p. 400. "Little children have a right to go upon the streets of a city for air and exercise, without regard to the occupation or pecuniary condition of their parents; and a city's duty towards a child who is lawfully upon a street or bridge does not differ from its duty towards an adult, even though the child may be incidentally using the way for purposes of play, e.g., rolling a hoop. * * . But children using a highway merely for play, are putting

Judgment. it to a use for which it was not intended, and cannot Falconbridge, recover for injuries due to defects or obstructions."

J.

The cases cited in support of the proposition just enunciated seem to be founded on a condition of law as to municipal liability similar to our own, and the opinions of the learned Judges who decided them are entitled to great respect. They are: *Stinson v. City of Gardiner* (1856), 42 Me. 248; *Blodgett v. The City of Boston* (1864), 8 Allan (Mass.) 237; *Tighe v. City of Lowell* (1876), 119 Mass. 473.

Compare, *Harrison v. Duke of Rutland* (1892), 9 Times L. R. 115, where plaintiff went on a highway, the soil of which was vested in the defendant, not for the purposes of passing and repassing, but to spoil the grouse drive of defendant, who was shooting on his moors adjoining the highway. Held, that plaintiff was a trespasser on the highway, and that defendant was justified in using such force towards plaintiff as was necessary to abate such trespass.

I think that on this ground I must dismiss this action, which I do, without costs.

Defendants having thus apparently a complete defence have brought in the third party *ex abundanti cautela* and for their own protection and they are ordered to pay his costs.

Judgment accordingly.

G. A. B.

[DIVISIONAL COURT.]

McSHANE

V.

THE TORONTO, HAMILTON AND BRUCE R. W. CO.

Negligence—Trespass—Dangerous Article Near Highway—Infant.

Plaintiff, a boy of twelve years of age, passing along the highway entered upon defendants' property which adjoined it, and taking a fog signal out of a box on a hand car standing there, struck the fog signal with a stone when it exploded injuring him :—

Held, that the defendants were not liable.

Judgment of ARMOUR, C.J., at the trial, affirmed.

THIS was an appeal by the plaintiff from the judgment Statement.
at the trial in an action brought by Patrick McShane, an
infant, for injuries sustained by him.

The action was tried at Hamilton on the 18th April, 1899, before ARMOUR, C.J., and a jury.

The evidence shewed that the plaintiff, with other boys, was passing the defendants' property, which adjoined the railway track on one side and the highway on the other, and on which was situated a tool house, where there was standing a lorry or hand-car with tools, bolts, etc., on which was a box containing fog signals. The boys seeing the fog signals went to the car and each took one: the plaintiff taking one to the track struck it with a stone when it exploded and injured him.

The trial Judge held that as the plaintiff was a trespasser on the railway company's property he could not recover, and withdrew the case from the jury, dismissing the action with costs.

The appeal was argued on the 5th day of October, 1899, before a Divisional Court composed of BOYD, C., and FERGUSON, J.

Argument. *Lynch-Staunton*, Q.C., for the appeal, contended that the evidence shewed that dangerous signals were placed near a highway, which were in their nature alluring to children, and appealed to the instinct of the child, inducing him to meddle with them; that although a person is not liable for the consequences of a natural danger on his property, if he places an artificial danger there he is liable, and that the defendants should have kept the dangerous articles safely, and not have left them exposed and in the way of passing boys, referring to *Smith v. Hayes* (1898), 29 O. R. 283, at p. 297; *Jewson v. Gatti* (1886), 2 Times L. R. 441; *Hardcastle v. The South Yorkshire R. W., etc., Co.* (1859), 4 H. & N. 67; *Pointing v. Noakes*, [1894] 2 Q. B. 281; *Powers v. Harlow* (1884), 53 Mich. 507; 51 Am. Rep. 154, *per* Cooley, C.J.; *Williams v. Eady* (1893), 10 Times L. R. 41.

D'Arcy Tate, *contra*, contended that the evidence shewed the dangerous articles were as safely cared for and protected as they could be under the circumstances on the defendants' own property; and that in any event the plaintiff was a trespasser on the defendants' property before he could approach or get access to them; he referred to *Lynch v. Nurdin* (1841), 1 Q. B. 29; *Hughes v. Macfie* (1863), 2 H. & C. 744, and cases collected in *Smith v. Hayes* (1898), 29 O. R. 283.

Lynch-Staunton, in reply, referred to *Biggs v. Consolidated Barb-Wire Co.* (1899), 5 Am. Neg. Rep. 335.

October 13, 1899. BOYD, C.:—

The question of law involved in this case is not without nicety, and perhaps difficulty. It was adverted to by Collins, J., in giving judgment in *Pointing v. Noakes*, [1894] 2 Q. B. 281, when speaking of the case put in argument of a poisonous drug exposed in a very tempting shape in an open shop front beside a highway within reach of a child, who, being tempted, ate it and was injured. He thereupon remarked, "If an action could be maintained in such a

case it would, I think, be only on the analogy of those cases which decide that the person who makes or keeps a pitfall so near the highway as to be a danger to persons passing along it is responsible in damage to a passenger along the highway who accidentally falls into it (see *Barnes v. Ward* (1850), 9 C. B. 392), the child obeying its instinct being regarded as in the same position as a person who without negligence falls off the highway into the pitfall : " p. 291.

Judgment.

Boyd, C.

These analogous cases, he goes on to observe, rest on the special duty incident to the occupation of property adjoining a highway. It is put in the same case by Mr. Justice Charles thus : " We must ask, in each case, whether the man or animal which suffered had, or had not, a right to be where he was when he received the hurt? If he had not, then (unless indeed the element of intention to injure, as in *Bird v. Holbrook* (1828), 4 Bing. 628, or of nuisance, as in *Barnes v. Ward*, 9 C. B. 392, is present)—no action is maintainable : " *ib.*, p. 286.

In the present case there is no element of intention, for the fog signals were not left where they were to induce any one to take them, and no approach to nuisance affecting the highway, for the lorry, with its box and contents, was perfectly harmless to man or beast.

The whole injury was caused by various unauthorized acts of the boy : first, in going upon the railway land ; next, in taking out of the box in the lorry one of the fog signals ; and lastly, in carrying it off to the track and pounding it with a stone, by which the thing was destroyed and himself injured. This child, aged twelve, was not so young as to be unable to judge between right and wrong, and his conduct manifested a mixture of pilfering and destructive propensities which in an adult would be so blameworthy as to preclude all hope of compensation for his personal injury by the owner of the property destroyed.

Does the infancy of the plaintiff change the whole situation so that his intrusion on the land of the railway and his unlawful appropriation of and destruction of the chat-

Judgment.

Boyd, C.

tel to his own injury can be condoned in view of the alleged curiosity of youth, and the natural instinct to possess himself of the little box-shaped signal, and the further youthful impulse to break it open so as to see the inside? So to condone appears to me to place too high a premium on the so-called irrepressible movements of the youthful body and mind, and to impose a servitude on landowners which would prove a cruel and grievous burden.

I think that the defendants had the right to use the lot in question as they did for the purpose of keeping or storing the lorry with its load of materials and appliances when not required, and that they were under no obligation to the stray children of that neighbourhood to fence or lock or house these fog signals in such a way as to render access to them more difficult.

Most of the cases on this head of law are collected and discussed in *Smith v. Hayes* (1898), 29 O. R. 283. The latest English case is *Harrold v. Watney*, [1898] 2 Q. B., at p. 322, in which the element of nuisance was the ground of decision. The latest Canadian case is *Makins v. Piggott* (1898), 29 S. C. R. 188, in which the essential point of difference from the present case appears to be that the detonating caps which were almost self explosive were found in or by the unused part of a public cemetery, and so scattered about on the ground as to invite the picking of them up; here the things were stored as the property of the railway in their hand car on their own land. As stated in the judgment of Mr. Justice King, the negligence consisted in leaving the explosive caps in a place where they might innocently be picked up and handled in a way leading to their explosion by a person unaware of their dangerous character. Nothing in the judgment is made to turn on the youthful condition of the plaintiff.

Here I think the element of innocent taking is eliminated, and the further element of any invitation or inducement on the part of the defendants inciting the taking of the chattels is also absent. The whole transaction is to my mind the result of the lad going to the hand car where he had

no business, and taking the fog signal which was not right, and then proceeding to pound it to pieces whereby he was hurt by his own act of violence. Judgment.
Boyd, C.

The judgment should stand affirmed.

FERGUSON, J. :—

After having read the evidence and perused the multitude of authorities referred to on the argument, I have arrived at the conclusion that the judgment appealed from is right, and should be affirmed. I do not think that I can with profit add to what appears in the judgment of the Chancellor, in which I agree. I think the appeal should be dismissed.

G. A. B.

RE HYDE V. CAVAN.

Prohibition—Division Courts—Examination of Judgment Debtor—Government Official—Order for Payment—Committal.

A County Court Judge has jurisdiction under R. S. O. ch 60, sec. 247, as amended by 61 Vict. ch. 15, sec. 4 (O.), in an action in a Division Court after the examination of, and an order for payment by, a judgment debtor who is a Government official, to commit him for default in payment, although he has no other source of income than his official salary. Prohibition refused.

THIS was an application for prohibition to the County Judge of the county of Perth, who had made an order in a Division Court action for the committal of the defendant, an inland revenue officer, for non-compliance with an order for the payment by monthly instalments of a judgment debt under the circumstances set out in the judgment. Statement.

The motion was heard in Chambers on October 16th and 20th, 1899, before BOYD, C.

W. H. Blake, for the motion. The defendant is a Dominion official and his salary cannot be attached, nor can he be committed, as either would prevent him performing his

Argument. duties to the Crown. The evidence shews he has no other source of income than his salary, and that a committal would withdraw him from his duties to the public, and be even more contrary to public policy than garnishment: *Ex p. Dakins, In re Swan v. Dakins* (1855), 16 C. B. 77.

J. H. Moss, contra. No ground of public policy protects the defendant. He is in contempt for nonpayment, and so open to commitment, and no prohibition lies: R. S. O. ch. 60, secs. 157, 247, 252, and 61 Vict. ch. 15, sec. 4 (O.). There was jurisdiction in the County Judge and no excess, and he will not be interfered with by prohibition: *In re Mirams*, [1891] 1 Q. B. 594; *Apthorpe v. Apthorpe* (1887), 12 P. D. 192; *Lucas v. Harris* (1886), 18 Q. B. D. 127; *Flarty v. Odium* (1790), 3 T. R. 681; *Stonor v. Fowle* (1887), 13 App. Cas. 20; *In re Watson*, [1893] 1 Q. B. 21; *Re Teasdale v. Brady* (1898), 18 P. R. 104; *In re Reid v. Graham Bros.* (1894), 26 O. R. 126; *Bland v. Andrews* (1880), 45 U. C. R. 431.

Blake, in reply. If the proceedings are so conducted as to be contrary to public policy, the Judge will be prohibited. Prohibition will sometimes be granted in cases where there is no excess of jurisdiction in the ordinary sense: Shortt on Informations, Mandamus and Prohibition, 437; *Re McLeod & Emigh* (1888), 12 P. R. 450.

October 21, 1899. BOYD, C. :—

The County Judge upon the examination of the defendant as a judgment debtor made an order that he pay the debt by instalments of \$8 per month—the first payment to be on or before the 1st May, 1899.

Having failed to pay he was summoned to appear to answer for his default under the 247th section of the Division Court Act, R. S. O. ch. 60, as amended by 61 Vict. ch. 15, sec. 4 (O.), and after examination had, the learned Judge found that the defendant had no other income out of which payment could be ordered than that of the defendant as a collector of inland revenue.

The whole amount of salary is \$1,568, payable monthly, at the rate of \$130.67, and it was ordered that the defendant be committed for ten days for wilful contempt in not paying pursuant to the former order, "he having ample means so to do."

Judgment.

Boyd, C

Prohibition is now sought by the defendant on the grounds as argued, that the salary of a public officer of the Dominion is exempt from execution or legal process, and that to attempt to reach the salary in this way is more obnoxious to the effective service of the public officer than by method of direct attachment, as it may subject him to compulsory detention from the duties of his office. On the other hand it is answered that despite any suggestion based on consideration of public policy, there was in this case jurisdiction to deal with the application under the Division Courts Act, so that prohibition does not lie.

This latter is, I think, the correct view. The statute as amended at the time of the order, gives a discretionary power to the Judge to commit: "If it appears that the judgment debtor had, when or since judgment was obtained against him, sufficient means and ability to pay * * the instalments * * ordered * * without depriving himself or his family of the means of living, and that he has wilfully refused or neglected to pay the same * * ."

Here it was competent for the Judge to ascertain whether the monthly income permitted such a deduction as would answer the instalments ordered, leaving enough for proper maintenance—a question of fact within his jurisdiction. The inquiry is as to "sufficient means and ability," very general language, not limited by any investigation as to the source of supply. Even in an appeal (although there may be no right of appeal in this matter), there will be no light interference with the conclusion of a Judge who has been judicially satisfied with the ability of a debtor to pay: *Esdaille v. Visser* (1880), 13 Ch. D. 421. Under the English Debtors Act the inquiry in analogous cases is whether the debtor has "the means to pay," and the Judges have held that it is immaterial from what

Judgment. source the debtor has obtained the means—whether by gift or charity, or in any other way—it may be from any source whatever: *Ex p. Koster, In re Park* (1885), 14 Q. B. D., at p. 599.

Boyd, C.

Apart from this aspect of the case the order complained of is not so much by way of execution whether qualified or otherwise, as it is of a punitive character, according to the opinion of the law lords in *Stonor v. Fowle* (1887), 13 App. Cas. 20.

However viewed, the jurisdiction of the Judge below seems to be indubitable, and therefore the exercise of it cannot be reviewed or set aside by the method of prohibition.

Dismiss the appeal with costs.

G. A. B.

IN RE PATTULLO AND THE CORPORATION OF THE TOWN OF ORANGEVILLE.

Municipal Corporations—Arbitration as to Lands Injurious Affected—Costs—Discretion—R. S. O. ch. 223, secs. 437, 448, 460.

The power given by the Municipal Act, R. S. O. ch. 223, sec. 460, to arbitrators under that Act “to award the payment by any of the parties to the other of the costs of the arbitration, or of any portion thereof,” should receive the same construction as Consolidated Rule 1130; the discretion given is a legal discretion, and subject to the rule that when the claimant has been guilty of no misconduct, omission, or neglect such as to induce the Court to deprive him of his costs, the unsuccessful party should bear the whole costs of the litigation.

Statement.

THIS was a motion to vary the award of the County Court Judge of Dufferin, as arbitrator under the Municipal Act, R. S. O. ch. 223, secs. 437, 448. The plaintiffs claimed that their property was injuriously affected by reason of the above corporation having, under by-law, built, erected and constructed a granolithic sidewalk on the south side of Broadway street and in front of the plaintiffs' property raised it to an artificial level and to a height above the level of the floor of the building upon the property, which was

erected before the passing of the by-law, to the great injury of the building and property, and notified the corporation thereof, and that they desired to refer the question of the compensation to be paid them therefor, and appointed the Judge of the County Court of Dufferin as the arbitrator to determine the question, which appointment was assented to by the corporation. Statement.

The Judge, after hearing evidence, made an award on June 2nd, 1899, awarding and adjudging that the matters complained of by the claimants did not come within the arbitration clauses of the Municipal Act, and were not among the subjects directed by section 437 of that Act to be determined by arbitration, and further awarding and adjudging that the costs of his award and all his other fees as arbitrator should be paid by the claimants, but that otherwise, and except such fees, each party should bear and pay his and their own costs of the arbitration and of the proceedings connected therewith.

Upon motion made to this Court by the claimants on June 27th, 1899, it was ordered that the award be set aside, and that the matters in dispute be remitted to the Judge to adjudicate and determine the case as based upon the alteration of the grade of the street, irrespective of any claim for negligence, if the applicants should be able to establish any claim for damages. And it was further ordered that the costs of the appeal should follow the ultimate result of the arbitration.

The learned Judge thereupon having heard all the evidence adduced by both parties on August 29th, 1899, made the following award: "I award and adjudge that the said corporation of the town of Orangeville do, and shall pay to the claimants the sum of fifty-one dollars and fifty cents, as compensation for damages necessarily resulting from the exercise of the powers of the said corporation in building the cement sidewalk opposite the property of the claimants in question herein, beyond any benefit or advantage derivable by the said claimants from the said work, said payment to be made within one month

Statement. after the publication hereof, and notice to the said corporation of this award.

"I further award, order and direct, that the costs of this arbitration or reference back, shall be paid by the corporation of the town of Orangeville, and the same shall be taxed on the County Court scale, and that the costs of the arbitrator and of this award be paid by the claimants and the corporation of the town of Orangeville in equal proportions."

On September 28th, 1899, *Meyers*, Q.C., moved to vary this award (1) by directing the corporation of the town of Orangeville to pay the full costs of the arbitration and reference back, including arbitrator's fees, costs of award, and stenographer's fees; (2) or in the alternative for an order referring back the award to the arbitrator, to remove the ambiguity as to the disposition of the costs.

Hughson, shewed cause.

October 9th, 1899. ARMOUR, C. J.:—

By section 460 of the Municipal Act, R. S. O. ch. 223, it is provided that "the arbitrators shall have power to award the payment by any of the parties to the other of the costs of the arbitration or of any portion thereof," thus making such costs in the discretion of the arbitrator.

But this discretion must be a legal discretion.

In *Rooke's* case (1598), 5 Reps. 100a, it is said that, "Notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith *talīs discretio discretionem confundit*."

In *Keighley's* case (1610), 10 Reps. 140a, it is said

"Lastly, it was resolved, that these words in the said Act, Judgment: i.e., 'according to your wisdoms and discretions,' are to be Armour, C.J. intended and interpreted according to law and justice, for every Judge or commissioner ought to have *duos sales*, viz., *salem sapientiæ ne sit insipidus, et salem conscientiæ ne sit diabolus*. Also discretion, as it is well described, is *scire per legem quid sit justum*."

In 2 Inst. 298, it is said, "Though the statute referreth the surety to the discretion of the Court, yet it will be good to follow precedents of former times for *discretio est discernere per legem quod sit justum*."

In *Rex v. Wilkes* (1770), 4 Burr. 2539, Lord Mansfield said, "But discretion, when applied to a Court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful; but legal and regular." See also *Wilson v. Rastall* (1792), 4 T. R., at p. 757.

In *Lee v. Bude & Torrington Junction R. W. Co.* (1871), L. R. 6 C. P., at p. 580, Willes, J., said, "I entirely agree that the Court is not bound under that section absolutely to issue a *sci. fa.* against the alleged shareholders. It was intended that the Court should exercise a discretion, that is a judicial discretion, regulated according to known rules of law. That is the meaning of the expression as usually found in the books."

In *re Taylor* (1876), 4 Ch. Div., at p. 159, Jessel, M. R., said, "Therefore the law was altered by Talfourd's Act to this extent, that that which was formerly the absolute right of the father, became, and is now, subject to the discretionary power of the Judge. When I say 'the discretionary power of the Judge,' I mean that though the Act of Parliament gave the power in the most ample terms in which language could express it, 'if he should see fit,' or as the recent Act expresses it 'as the Court shall deem proper or shall direct,' yet of course like every other power given to a Judge, the discretion of the Judge is to be exercised on judicial grounds—not capriciously, but for substantial reasons:" see *Doherty v. Allman* (1878), 3 App. Cas. 728.

Judgment. In *Regina v. Vestry of St. Pancras* (1890), 24 Q. B. D., at pp. 375-6, Lord Esher, M.R., said, "If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then, in the eye of the law, they have not exercised their discretion."

Section 460 ought to receive the same construction as Consolidated Rule 1130: *Re Foster v. Great-Western R. W. Co.* (1882), 8 Q. B. D. 515.

And this Rule gave to the High Court the same discretion as to costs which was before the Judicature Act exercised by the Court of Chancery.

In *O'Lone v. O'Lone* (1850), 2 Gr., at p. 131, the Chancellor, in giving judgment, said: "In *Earl Nelson v. Lord Bridport*, Lord Langdale observed: 'At one time there was more discretion as to costs in cases of this kind than at present. On many recent occasions the Court has brought back the strict rule, though it still retains its discretion, yet it has acted on the rule that *prima facie* the unsuccessful party is to be charged with costs of the suit;' and proceeded thus, "Experience has, I think, clearly evinced the expediency of determining questions of costs as far as possible upon fixed principles; and the rule to which I have referred ought not, in my opinion, to be departed from where it is applicable, unless under circumstances clearly warranting the exception."

In *Downey v. Roaf* (1873), 6 P. R. 89, Blake, V.-C., after referring to certain cases therein named, said: "Following these cases I must hold that though the disposition of the costs is in the discretion of the Court, it will exercise its discretion by directing the costs to follow the result, unless very special circumstances appear in the case."

And this appears to have been the general rule up to the time of the passing of the Judicature Act.

In *Cooper v. Whittingham* (1880), 15 Ch. D., at p. 504, Jessel, M.R., said: "As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and

there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts; for instance; there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind the rule is plain and well settled, and is as I have stated it.”

This rule so laid down was referred to with approval by the Court of Appeal in *Jones v. Curling* (1884), 13 Q. B. D. 262, and I find nothing in any subsequent case casting doubt upon the principle of the rule.

For exercising the jurisdiction as to costs conferred upon the arbitrators by section 460 of the Municipal Act, and in making use of their discretion in dealing with the costs, they should, in my opinion, be governed by the rule so laid down.

I have read all the proceedings and the evidence in this matter, and I find nothing therein to warrant any departure from the rule that the unsuccessful party should bear the whole costs of the litigation.

The claimants took the proceedings they did to enforce a legal right, to obtain compensation for their property having been injuriously affected by the exercise by the corporation of its powers, they established their right to compensation, and the learned arbitrator allowed them compensation, and I see no reason why he should not have allowed them all the costs they incurred in enforcing their right.

The compensation awarded by the learned arbitrator was extremely moderate for the substantial injury occasioned to the plaintiffs' property, and I do not think it could be said to be “*per legem justum*” to distribute the costs, thereby depriving the plaintiffs of the larger part, if not of the whole, compensation awarded.

Judgment.

Armour, C.J.

Judgment. The award must, therefore, be modified by directing **Armour, C. J.** that the corporation shall pay to the plaintiffs all the costs of the arbitration, including the reference back to be taxed on the County Court scale and the arbitration fees, the costs of the award, and the stenographer's fees.

And the costs of this motion must be paid by the corporation.

A. H. F. L.

LILLIE ET AL. V. WILLIS ET AL.

Will—Devise Over—Impossibility of Event—"And"—Lifetime of Two Persons—Death of One.

A testatrix devised and bequeathed all her real and personal estate to her son in fee with a proviso that in case he should die without issue previous to the death of "my brother * * and sister * *," then over.

The sister mentioned died in the lifetime of the son :—

Held, that as the event, viz., the death of the son previous to the death of both the brother and sister, could not happen, the son took an estate in fee simple.

Statement. THIS was an action for the construction of the will of Mary Lillie.

The opinion of the Court was asked as to what estate the plaintiff took in the property under the clause of the will and the circumstances mentioned in the judgment, and the matter came on by way of motion for judgment on the 9th November, 1899, before FERGUSON, J.

George Wilkie, for the plaintiff, contended that under the will the plaintiff took a defeasible estate in fee: *Nason v. Armstrong* (1892), 22 O. R. 542; that the condition of the defeasance was that he should die previous to the death of both the sister and brother, and that the sister having died in his lifetime the condition could never be fulfilled,

and that the word "and" should not be read "or" where the effect is to divert an interest, and cited *Malcolm v. Malcolm* (1856), 21 Beav. 225; *Day v. Day* (1854), Kay 703; Jarman on Wills, 5th ed., 490. Argument.

November 10th, 1899. FERGUSON, J.:—

The action is for the construction of the last will of the late Mary Lillie, in her lifetime of the city of Toronto, who died in March, 1891.

Of the four defendants no one defends the action and the pleadings have been noted against them. The true construction and meaning of the will is considered of importance in respect to the title of certain lands situated in Toronto. Excepting formal parts, the will is contained in one clause which is as follows:

"I give, devise, and bequeath all my messuages, lands, tenements, and hereditaments, and all my household furniture, ready money, securities for money, goods and chattels, and all other my real and personal estate and effects whatsoever and wheresoever situate, unto my son William Adam Lillie, his heirs, executors, administrators and assigns, but in case the said William Adam Lillie should die without issue previous to the death of my brother Walter George Willis and sister Sophia Eliza Bessie Willis, I hereby give and bequeath the rent derived from my freehold tenements and the interest from my personal estate and ready money, which I desire my trustee to put out to interest at the best advantage, to be equally divided between my brother Walter George Willis and my sister Sophia Eliza Bessie Willis each one to have a share and to share alike as the rent and interest becomes due, and in case of the death of the said Walter George Willis or the said Sophia Eliza Bessie Willis I give and bequeath their shares to my brother William Walter Willis, his heirs and assigns."

William Adam Lillie, the son of the testatrix, is still living, and is one of the plaintiffs. Walter George Willis

Judgment. is also still living, but Sophia Eliza Bessie Willis died
Ferguson, J. subsequent to the death of the testatrix without issue and without having been married. William Walter Willis died in the year 1892 leaving a widow and three sons, his only sons and heirs-at-law.

The part of the clause which gave rise to the seeming difficulty is the words: "but in case the said William Adam Little should die without issue previous to the death of my brother Walter George Willis and sister Sophia Eliza Bessie Willis, I hereby bequeath," etc.

The plaintiffs' contention is that as William Adam Lillie is still living and Sophia Eliza Bessie Willis is dead, the event, upon the happening of which, the gift over was, according to the will, to take effect has not happened and cannot ever happen because that event was the death of William Adam Lillie previous to the death of both Walter George Willis and Sophia Eliza Bessie Willis: that the word "and" coupling these two cannot and should not be changed to the word "or," and that for this reason the estate in fee in the lands given to William Adam Lillie subject only to the happening of this event became an estate in fee simple absolute.

A very considerable number of decisions on the subject of "and" being changed into "or" in gifts over are collected in Theobald on Wills, 3rd ed., 536 *et seq.* There is also some discussion on the subject in Jarman on Wills, 5th ed. 490, where the case, or one of the cases, relied on by counsel for the plaintiff is referred to. That is the case *Day v. Day* (1854), Kay 703, where it was held that "die in the lifetime of my said wife and my said brother" meant die in their joint lifetime.

After having examined these authorities and considered the question as best I have been able, I have arrived at the opinion that the contention on behalf of the plaintiffs is the correct one.

I think, moreover, that in the case of the present will one is not left entirely to a consideration of the words in which the happening of the event is couched, for it is

quite plain from the subsequent part of the clause that Judgment. the testatrix contemplated that should the gift over take Ferguson, J. effect both Walter George Willis and Sophia Eliza Bessie Willis would then be living.

I think the plaintiffs' contention as I have stated it to be is well based upon the language of the will and I see no reason for changing or seeking to change the words or any of them.

I am, therefore, of the opinion that assuming the testatrix had an estate in fee at the time of her death, that estate in fee became an absolute estate in fee vested in William Adam Lillie and that if it be assumed that he has not parted with it he is entitled to an estate in fee in the lands in question. It was said, however, that he had conveyed his estate and interest to his co-plaintiff and if so she is the owner and possessor of the same estate in fee.

Then, assuming my conclusion to be correct, I need not say anything as to rights of the other parties, for on such assumption they have no interests.

G. A. B.

SMYLIE ET AL. V. THE QUEEN.

Crown—Timber Licenses—Renewal—New Regulations—"Manufacturing Condition"—61 Vict. ch. 19 (O.)—Application to Past Sales—Powers of Provincial Legislature—Sale of Public Lands—B. N. A. Act, sec. 92 (5).

The statute of the Province 61 Vict. ch. 9 (O.), which enacts that all sales of pine timber which shall be thereafter made and every license thereafter granted shall be made or granted subject to the condition set out in the Crown timber regulations made by order in council of the 17th February, 1897, that all pine timber cut under such license shall be manufactured into sawn lumber in Canada, is *intra vires* the Ontario Legislature, being an enactment in relation to "the management and sale of the public lands belonging to the Province and of the timber and wood thereon," within the meaning of sec. 92 (5) of the British North America Act, and not to "the regulation of trade and commerce," within the meaning of sec. 91 (2).

The above Provincial statute applies not only to future sales of timber, but also to renewals of licenses to cut pine timber granted before it was passed, and which were issued pursuant to the Act respecting Timber on Public Lands, subject to the condition that the licensee should comply with all regulations "that are or may be established by order in council," the holders of which licenses are not entitled to renewals thereof free from conditions coming into force after the issue of the license originally granted.

Statement. THIS was a petition of right with respect to timber licenses, tried before STREET, J., without a jury, at Toronto, on the 6th and 7th November, 1899. The facts and arguments are stated in the judgment.

Robinson, Q.C., and H. J. Scott, Q.C., for the suppliants.

S. H. Blake Q.C., and Walter Gow, for the Crown, represented by the Government of Ontario.

November 24, 1899. STREET, J.:—

The rights claimed by the suppliants have their origin in three licenses to cut timber upon certain public lands of the Province, the first bearing date on the 10th April, 1873, and the other two on the 2nd October, 1888, issued by the Commissioner of Crown Lands for the Province of Ontario, acting under the authority of certain statutes and orders in council.

The statute in force at the date of the first of these licenses was chapter 23 of the Consolidated Statutes of

Canada, entitled "An Act respecting the Sale and Management of Timber on Public Lands." This Act was a re-enactment and consolidation of an Act passed in the same language by the Parliament of Canada in 1849, being chapter 30 of 12 Vict., which was the origin of the legislation upon the subject, and which has held its place in its original form and substance in the various revisions and consolidations of the statutes of the Province down to the present time. Prior to the passing of the statute of 1849, the sales of Crown timber had been regulated by proclamation of the Governor-General, and by orders in council passed from time to time.

Judgment.
Street, J.

The sections of ch. 23 C. S. C., bearing upon the claim of the suppliants, are as follows:—

Section 1. "The Commissioner of Crown Lands, or any officer or agent under him authorized to that effect, may grant licenses to cut timber on the ungranted lands of the Crown, at such rates, and subject to such conditions, regulations, and restrictions, as may from time to time be established by the Governor in council, and of which notice shall be given in the Canada Gazette."

Sub-section 2. "No license shall be so granted for a longer period than twelve months from the date thereof * * *."

Section 2. "The said licenses shall describe the lands upon which the timber may be cut, and shall confer for the time being upon the nominee the right to take and keep exclusive possession of the lands so described, subject to such regulations and restrictions as may be established; and such licenses shall vest in the holders thereof all rights of property whatsoever in all trees, timber, and lumber cut within the limits of the license during the term thereof * * *."

Regulations under the authority of the first section of this Act have been from time to time approved, altered, and amended. Those in force at the date of the first of the three licenses in question were passed in 1869, and they remained in force with no material alteration at the time the other two licenses were issued; they are, in fact,

Judgment. in force at the present time with certain amendments, to
Street, J. which it is necessary hereafter to refer.

The order in council of 1869 describes the regulations in question as being sanctioned and established under ch. 23, C. S. C. : those material to the present controversy are as follows :

"3rd. The berths or limits, when surveyed and set off,
* * shall be explored and valued, and then offered for sale by public auction at the upset price fixed by such valuation, at such time and place, and on such conditions, and by such officer, as the Commissioner of Crown Lands shall direct by public notice for that purpose, and shall be sold to the highest bidder for cash at the time of sale."

"5th. License holders who shall have complied with all existing regulations shall be entitled to have their licenses renewed on application to the Commissioner of Crown Lands, or to such local agent as he may appoint for that purpose."

"11th. All timber licenses are to expire on the 30th April next after the date thereof, and all renewals are to be applied for and issued before the 1st July following the expiration of the last preceding license, on default whereof the right to renewal shall cease, and the berth or berths shall be treated as forfeited."

"12th. No renewal of any license shall be granted unless or until the ground rent and all costs of survey and all dues to the Crown on timber, saw logs, or other lumber cut under and by virtue of any license other than the last preceding, shall first have been paid."

"13th. All timber berths or limits shall be subject to an annual ground rent of \$2 per square mile, payable in advance, before the issuing of any original license or renewal."

"14th. All timber, saw logs, wood, or other lumber, cut under any license now in force, or under any license which may be hereafter granted, shall be subject to the payment of the following Crown dues, that is to say : "

Then follows a table of dues per cubic foot, payable upon the cutting of the various classes of logs and timber.

"24th. Licenses are to be granted in the annexed form, in duplicate, one of which shall be given to the licensee, and the other left on file at the Crown Lands Department." Judgment.
Street, J.

Then follows a form of license, being that in which the license granted James Wilkinson on the 10th April, 1873, set out below, was issued.

Pursuant to the statute and regulations, an auction sale was held at Toronto, on the 15th October, 1872, of timber berths, under the authority of the Commissioner of Crown Lands. In the advertisement of the sale, as well as the printed conditions for the guidance of purchasers, it is set forth that "licenses for berths sold will be issued one month after date of sale and payment of bonus and ground rent for current season, subject to existing Crown timber regulations, and to such regulations as may hereafter be established by order in council, and also to all orders in council now existing, or hereafter to be adopted affecting licensed territory."

The first of the three licenses forming the foundation of the claim of the suppliants was issued on the 10th April, 1873, to one James Wilkinson, who had become the highest bidder at the sale of the 15th October, 1872, of the timber berth or location referred to. The license so issued is in the following terms :

"By authority of chapter 23 of the Consolidated Statutes of Canada, 34th Victoria chapter 19 of the statutes of Ontario, and the Crown timber regulation dated the 16th day of April, 1869, and for and in consideration of the payments made and to be made to Her Majesty :

"I do hereby give unto James Wilkinson, of the town of Barrie, Esquire, and unto his agents and workmen, full power and license to cut every description of timber and saw logs on unlocated and unsold lands or lots, and all pine trees on lots sold or located, under the orders in council of the 27th of May, 1869, or patented as mining lands under the general Mining Act of 1869, upon the location described on the back hereof by number, and to

Judgment.
Street, J.

hold and occupy the said location to the exclusion of all others, except as hereinafter mentioned : from 22nd January, 1873, to 30th April, 1873, and no longer ; with the right of conveying away the said timber through any ungranted or waste lands of the Crown.

“ And by virtue of this license, the said licensee has right, by the said Provincial statute, to all timber cut by others during the term of this license in trespass on the ground hereby assigned, with full power to seize and recover the same anywhere within this Province.

“ But this license is subject to the following conditions, viz : That nothing herein shall prevent any person or persons from taking standing timber of any kind to be used for the making of roads or bridges or for public works, the authority of the Department having first been obtained.

“ And that persons settling under lawful authority or title within the location hereby licensed, shall not in any way be interrupted in clearing and cultivation by the said licensee, or any one acting for him or by his permission.

“ And further, under condition that the said licensee or his representatives shall comply with all regulations that are or may be established by order in council, and shall submit all the timber, saw logs, or other lumber cut under this license to be counted or measured, and settle for the duties chargeable thereon, when required by me or any officer thereunto authorized,—otherwise the said timber will be forfeited to the Crown, and the said licensee be subject to such other penalties as the Act provides.

“ Given under my hand at Toronto the tenth day of April in the year of our Lord one thousand eight hundred and seventy-three, in duplicate.

Ground rent paid for this license	\$ 72 00
Bonus	1,980 00
	<hr/>
	\$2,052 00

(Sgd.)

“ THOS. H. JOHNSON,
“ Asst. Commr.

“(DESCRIPTION.)

Judgment.

Street, J.

“This license not to interfere with prior licenses.

“This license is subject to order in council of 19th April, 1872, authorizing the withdrawal at any time of any lot or lots, or portion of land, included in any license, when such withdrawal is deemed expedient in the interest of settlement.”

On the 27th April, 1885, an order in council was passed by which the Commissioner of Crown Lands was authorized, at any time during the currency of a timber license, to cancel the right under such license to cut timber other than pine upon any lots included in it which had been sold or located subsequent to the date of such license, or which might have been squatted upon with the *bond fide* intention of location or purchase, and that all timber licenses which might hereafter be issued should contain a condition in accordance with the above.

By another order in council of 27th April, 1887, the ground rent upon all licenses to cut timber thereafter issued was increased from \$2 to \$3 per square mile, and the Crown dues upon pine timber and saw logs was increased from the rate fixed by the regulations of 1869.

By another order in council passed 11th March, 1896, the right of license holders to cut timber upon certain lands granted to purchasers after the date of the original license was restricted to four years from the date of the patent.

Turning now to the other two licenses through which the suppliants claim, it appears that the timber berths covered by them were sold by auction in October, 1885, and that the first licenses issued to the purchasers were dated on 2nd October, 1888. Each license was in the following words, the description of the location indorsed upon them and the amount of the bonus constituting the only difference between them :—

“By authority of chapter 26 of the Revised Statutes of Ontario and the Crown timber regulations dated the 16th

Judgment.
Street, J.

day of April, 1869, and for and in consideration of the payments made and to be made to Her Majesty :

"I do hereby give unto Burton and Brother, and unto their agents or workmen, full power and license to cut every description of timber on lands or lots unlocated and unsold at the date of this license (or sold or located during the time this license is in force), and pine trees on lands or lots sold under order in council of 27th May, 1869, or sold or located under the Free Grants and Homesteads Act of 1868, or amendment of the said Act by chapter 4 of the statutes of Ontario of 1880, and pine and cedar trees, when reserved, on lots sold under order in council of 3rd April, 1880, prior to the date of this license, and pine trees on lots patented under said chapter 4, or patented as mining lands under the general Mining Act of 1869, upon the location described on the back hereof by berth and road allowance, and to hold and occupy the said location to the exclusion of all others, except as hereinafter mentioned, from 2nd of October, 1888, to 30th of April, 1889, and no longer ; with the right of conveying away the said timber through any ungranted, uncleared, or waste lands of the Crown :—

"And by virtue of this license, the said licensees have right by the said statute to all timber cut by others during the term of this license in trespass on the ground hereby assigned, with full power to seize and recover the same.

"But this license is subject to the following conditions, viz. :—

"To the withdrawal therefrom of lots located or sold under the Free Grants and Homesteads Act of 1868, prior to the passing of chapter 4 of the statutes of Ontario of 1880, and for which patent may be granted on the ground that five years had elapsed from the date of such location or sale, and that the conditions of settlement had been complied with prior to 30th April preceding the date or issue of the license.

"That any person or persons may at all times make and use roads upon and travel over the ground hereby licensed.

"That nothing herein shall prevent any person or per-

sons from taking from the ground covered by this license standing timber of any kind (without compensation therefor) to be used for the making of roads or bridges or public works, by or on behalf of the Province of Ontario, the authority of the Department of Crown Lands having first been obtained.

Judgment.
Street, J.

"That persons settling under lawful authority or title within the location hereby licensed shall not in any way be interrupted in clearing and cultivation by the said licensees, or any one acting for them or by their permission.

"That the Commissioner of Crown Lands, under order in council of 27th April, 1885, may at any time during the currency of this license cancel the right to cut timber other than pine upon any lots included in the description in this license which may have been sold or located subsequent to the date hereof, or upon any lots in said description which may have been squatted upon with the *bonâ fide* intention of location or purchase.

"And further, under condition that the said licensees or their representatives shall comply with all regulations that are or may be established by order in council, and shall submit all the timber, saw logs, or other lumber cut under this license to be counted or measured, and settle for the duties chargeable thereon, when required by me or any officer thereunto authorized—otherwise the said timber will be forfeited to the Crown, and the said licensees be subject to such other penalties as the Act provides.

"Given under my hand at Toronto the second day of October in the year of our Lord one thousand eight hundred and eighty-eight, in duplicate.

"Amount payable for this license :—

Original....	{	Ground rent.....	\$ 118
		Bonus.....	20,650
		Interest.....	
			<hr/>
			\$20,768

(Sgd.)

"AUBREY WHITE,
"Assistant Commissioner."

Judgment.

Street, J.

It is admitted that the three licenses in question have been from time to time renewed by the Commissioner of Crown Lands in the names of the persons who obtained them originally or their transferees, and that each such renewal has been framed in accordance with the regulations in force at the time the renewal was issued, and has not been limited only to those in force when the original was issued. The increased ground rent and Crown dues have been exacted in respect of the renewals of the license issued in 1873, and the conditions with regard to the withdrawal of the right to cut upon lots located or sold have been treated as binding upon the holders of that license as well as upon the holders of licenses issued after they were adopted by the order in council referred to.

On 17th May, 1895, a new form of license was adopted by order in council, and licenses in this form were issued to and acted upon by the suppliants the Canadian Bank of Commerce, who then and for some time before held all three licenses. The following is one of the licenses so issued, the others being precisely similar:—

“RENEWAL FOR 1897-8 OF LICENSE NO. 150 OF 1896-7.

“By authority of chapter 28 of the Revised Statutes of Ontario, 1887, and the Crown timber regulations dated the 16th day of April, 1869 (and subsequent orders in council affecting timber), and for and in consideration of the payments made and to be made to Her Majesty:

“I do hereby give unto the Canadian Bank of Commerce, and unto its agents or workmen, full power and license to cut every description of timber on lands or lots unlocated and unsold at the date of this license, and pine trees on lands or lots sold under orders in council of 27th May, 1869, or sold or located under the Free Grants and Homesteads Act, and pine and cedar trees, when reserved, on lots sold under order in council of 3rd April, 1880, prior to the date of this license, and pine trees on lots patented under the Free Grants and Homesteads Act, or patented or leased as mining lands under the mining laws, upon

the location described on the back hereof by berth and road allowances, and to hold and occupy the said location to the exclusion of all others, except as hereinafter mentioned, from the 25th of September, 1897, to 30th of April, 1898, and no longer; with the right of conveying away the said timber through any ungranted, uncleared, or waste lands of the Crown :—

Judgment.
Street, J.

“And by virtue of this license, the said licensee has right by the said statute to all timber cut by others during the term of this license in trespass on the ground hereby assigned, with full power to seize and recover the same.

“But this license is subject to the following conditions, viz :

“To the withdrawal therefrom of lots located or sold under the Free Grants and Homesteads Act of 1868, prior to the passing of chapter 4 of the statutes of Ontario of 1880, and for which patent may be granted on the ground that five years had elapsed from the date of such location or sale, and that the conditions of settlement had been complied with prior to 30th April preceding the date or issue of the license.

“To the withdrawal therefrom of all lots located or sold during the currency thereof immediately after location or sale as to timber other than pine.

“That any person or persons may at all times make and use roads upon and travel over the ground hereby licensed.

“That nothing herein shall prevent any person or persons from taking from the ground covered by this license, standing timber of any kind (without compensation therefor) to be used for the making of roads or bridges or public works, by or on behalf of the Province of Ontario, the authority of the Department of Crown Lands having first been obtained.

“That persons settling under lawful authority or title within the location hereby licensed, shall not in any way be interrupted in clearing and cultivation by the said licensee, or any one acting for it or by its permission.

Judgment.

Street, J.

"That the Commissioner of Crown Lands, under order in council of 27th April, 1885, may, at any time during the currency of this license, cancel the right to cut timber other than pine upon any lots included in the description in this license, which may have been squatted upon with the *bond fide* intention of location or purchase.

"And further, under condition that the said licensee or its representatives shall comply with all regulations that are or may be established by order in council, and shall submit all the timber, saw logs, or other lumber cut under this license to be counted or measured, and settle for the duties chargeable thereon, when required by me or any officer thereunto authorized,—otherwise the said timber will be forfeited to the Crown, and the said licensee be subject to such other penalties as the Act provides.

"Given under my hand at Toronto the twenty-fifth day of September in the year of our Lord one thousand eight hundred and ninety-seven, in duplicate.

Amount payable for this license :—

Ground rent.....	\$42 00
Bonus.....	\$
Interest.....	\$
	<hr/>
	\$42 00

(Signed) "AUBREY WHITE,

"Assistant Commissioner."

On 17th December, 1897, while the three renewals in this form were current, an order in council was passed in the following terms :—

"ORDER IN COUNCIL ESTABLISHING, SUBJECT TO THE APPROVAL OF THE LEGISLATURE, CROWN TIMBER REGULATIONS OF 17TH DECEMBER, 1897.

ORDER IN COUNCIL.

"Approved of by His Honour the Lieutenant-Governor the 17th day of December, A.D. 1897.

"Upon consideration of the report of the Honourable the Attorney-General dated 17th December, 1897, the

committee of council advise that the following Crown timber regulations be approved of by your Honour:

Judgment.
Street, J.

"(1) Every license or permit to cut pine timber on the ungranted lands of the Crown, or to cut pine timber reserved to the Crown on lands located, sold, granted, patented, or leased by the Crown, which shall be issued on or after the 30th day of April, 1898, shall contain and be subject to the condition that all pine which may be cut into logs or otherwise under the authority or permission of such license or permit shall, except as hereinafter provided, be manufactured into sawn lumber in Canada, that is to say, into boards, deals, joists, lath shingles, or other sawn lumber, or into waney board or square or other timber, in Canada; and such conditions shall be kept and observed by the holder or holders of any such license or permit, who shall cut or cause to be cut pine trees or timber under the authority thereof, and by any other person or persons who shall cut or cause to be cut any of such pine trees or timber under the authority thereof, and all pine so cut into logs or otherwise shall be manufactured in Canada as aforesaid.

"(2) Should any holder of a timber license or permit, or any servant or agent of such holder, or any person acting for him, or under his authority or permission, violate or refuse to keep and observe the condition mentioned in the preceding regulation, then and in such case the license or permit to cut pine timber on the berth, territory, lot or lots included in the license or permit, and on which or any part of which the pine was cut, and in respect of which or any part of which there was a breach of such regulation or a refusal to observe or keep the same, shall be suspended and held in abeyance, and shall not be reissued, nor shall a new license issue unless and until so directed by the Lieutenant-Governor in Council, and then only upon such terms and conditions as the Lieutenant-Governor in Council may impose.

"(3) The Commissioner of Crown Lands, his officers, servants, and agents, may do all things necessary to prevent

Judgment. a breach of the aforesaid condition or regulation, and to
Street, J. secure compliance therewith, and may, for such purpose, take, seize, hold, and detain all logs so cut as aforesaid, and which it is made to appear to the Commissioner of Crown Lands it is not the intention of the licensee, owner or holder, or person in possession of, to manufacture or cause to be manufactured as aforesaid in Canada, or to dispose of to others who will have the same so manufactured in Canada, until security shall be given to Her Majesty, satisfactory to the Commissioner, that the said condition will be kept and observed, and that such logs will be manufactured in Canada as aforesaid; and in the event of refusal on the part of the licensee, owner or holder, or person in possession of such logs, to give such security within four weeks after notice of such seizure and demand of security by or on behalf of the Commissioner, then the Commissioner may sell or cause to be sold such logs, by public auction after due advertisement, to some person or persons who will give such security to Her Majesty as the Commissioner may require, that such logs shall be manufactured in Canada. The proceeds of such logs shall, after such sale, and after deducting all expenses of such seizure and sale, and any sum due and owing to Her Majesty for or in respect of any timber dues, trespass dues, ground rent, or on account of the purchase of any timber or timber berths by the owner, licensee, or holder of a permit, or other person who has cut or caused to be cut such logs, or who is the owner or holder of the same, be paid over to the person entitled to the same.

“(4) Provided, nevertheless, that nothing in the preceding regulations which requires pine logs or timber to be manufactured in Canada, as aforesaid, shall apply to logs or timber cut and in use in Canada for any purpose for which logs or timber in the unmanufactured state, are or may be used.

“(5) Provided, further, that these regulations shall not apply to the east half of the township of Aweres, in the district of Algoma, containing $18\frac{1}{2}$ square miles, nor to 22

square miles in the district of Thunder Bay composed of berths 2, 3, and 4 of the timber sale of 1890.

Judgment.
Street, J.

"(6) The foregoing regulations shall not come into force unless and until they shall be approved by an Act of the Legislature."

On 17th January, 1898, an Act was passed by the Legislature of the Province of Ontario in the following terms:—

"61 Vict. ch. 9 (O.), passed 17th January, 1898.

"An Act respecting the Manufacture of Pine cut on the Crown Domain.

"Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

"1. All sales of pine timber limits or berths by the Commissioner of Crown Lands which shall be hereafter made, and all licenses or permits to cut pine timber on such limits or berths thereafter granted by the Commissioner, shall be so made or granted subject to the condition set out in the first regulation of Schedule A. of this Act, and it shall be sufficient if such condition be cited or mentioned as "The Manufacturing Condition" in all notices, licenses, and permits or agreements or other writing.

"2. The regulations set out in Schedule A. to this Act are hereby approved.

"3. The Lieutenant-Governor in Council may make any further or additional regulations necessary to enable the Commissioner of Crown Lands to carry into effect the object and intent of the regulations contained in Schedule A.

"4. Section 1 of this Act shall come into force on the passing hereof, and the other parts of this Act shall come into force on the 29th day of April, 1898."

Schedule A.—(Schedule A. reproduces the above regulations of the 17th December, 1897.)

After the 29th April, 1898, the suppliants applied to the Commissioner of Crown Lands for a renewal for the year 1898-9 of their said licenses, without the insertion of the provision in the regulations of 17th December, 1897, referred to in the above statute as "the manufacturing

Judgment. condition," but the Commissioner refused to issue the
Street, J. license without this condition.

It is admitted that the suppliants had complied with all former conditions in the licenses previously issued to them.

Having obtained leave for the purpose, they have now filed their petition of right, praying for a declaration of their right to a renewal of their licenses without the manufacturing condition, and damages for the loss they have sustained by reason of the refusal of this right.

Their claim, at the argument, was placed upon the ground that they or their predecessors had purchased the right to the timber upon the limits from the Crown upon a contract for perpetual renewal of the yearly license, so long as they should comply with the regulations in force at the time they purchased, and that, in the absence of the clearest provisions to that effect in the writings forming their contract, it would be unreasonable to hold their rights to be subject to alteration from year to year, to their prejudice, by orders in council made without their consent.

In my opinion, not only the terms of the original licenses themselves, which, *prima facie* at all events, must be taken to shew the rights of the licensees, but everything surrounding the transaction, before and since, is opposed to the contention of the suppliants. In the first place, the statute under which the Commissioner of Crown Lands acts is as clear as words can make it: he is empowered to issue licenses, but only upon the terms prescribed *from time to time* by orders in council, and he is forbidden to grant any license for a longer period than a year. The object of the Act is plainly to prevent the Government existing at any particular time from binding itself or future Governments to abide by any particular regulations in their management of these immensely valuable portions of the public property, lest new circumstances should make it advisable in the public interest that changes should be made. The object of the Legislature to permit merely

temporary and not permanent regulations to be made being plainly and distinctly set forth in the Act, the language of the orders in council passed under it must be read by the light so furnished, and certainly should not be strained so as to convey an intention of departing from it. The intending purchaser is notified that his license will only be issued "subject to existing Crown timber regulations, and to such regulations as may hereafter be established by order in council, and also to all orders in council now existing or hereafter to be adopted affecting licensed territory."

Judgment.
Street, J.

In accordance with this provision, the licenses when issued are made upon condition that the licensees shall comply not only with all regulations that are, but also with those that may be, established by order in council. With the licenses are incorporated by reference the regulations of 1869 in force at the time, and it is upon the 5th regulation that the suppliants very largely found their claims. The terms of that regulation are that "license holders who shall have complied with all existing regulations shall be entitled to have their licenses renewed on application to the Commissioner of Crown Lands," etc. If this regulation stood alone, without the Act under which it was made, the conditions of sale at which the purchase was made, and the license which is to be read with it, there would be the greatest force in the argument that the original licensee was entitled to a perpetual renewal of his license from year to year upon compliance with the regulations in force when it was granted. But the Commissioners of Crown Lands in granting the licenses has imposed upon the licensees, as he was bound to do by the existing Act and regulations, the condition that not only the regulations in force at the time the licenses were granted, but those to be established, should be complied with; and the right of renewal conferred by the 5th regulation of 1869 must be taken to be a right of renewal upon the conditions in force at the time of the renewal. In other words, persons desiring to obtain timber licenses

Judgment.
Street, J.

are notified by statute, by conditions of sale, and by the form of license offered them, that they can only obtain them upon the understanding that the conditions upon which they are granted may be altered from time to time at the discretion of the Government, and that as their sole protection against wrong they must rely upon what has been termed "the infallible justice of the Crown," by the late Vice-Chancellor Esten in *Craig v. Templeton* (1860), 8 Gr. 483.

Such a bargain is by no means remarkable or unknown even in cases where the Crown is not a party: see *Pepe v. City and Suburban Permanent Building Society*, [1893] 2 Ch. 311, and the class of cases there referred to.

The sentences to which I was referred by counsel occurring in the report of the Commissioner of Crown Lands to the Provincial Legislature in the year 1872, do not appear to establish or assert any different interpretation of the rights of licensees. The Commissioner, it is true, asserts that they have vested rights to a renewal of their licenses, but it is plain that he contemplates only such a renewal as that which has always been conceded to them, viz., a renewal subject to the conditions and regulations in force at the time the renewal is granted.

Reference was properly directed upon the argument to the contemporaneous interpretation placed by the executive officers of the Crown, upon the regulations affecting the rights of license holders, and the manner in which they had been dealt with from time to time by the Department, as bearing upon the meaning which should now be placed upon them. It appears from the evidence of Mr. Aubrey White, the present Assistant Commissioner of Crown Lands, whose experience in the department goes back many years, that the invariable practice has been to embody in every license, whether an original or a renewal, all changes effected by orders in council in force at its date. This practice is apparent in the renewals of the licenses under which the suppliants claim. They and their predecessors periodically accepted licenses which contained not only

the conditions in force at the time of the original licenses, but all those additional ones subsequently adopted, and paid the additional ground rent and Crown dues on timber cut, imposed by the regulations of April, 1887.

Judgment.
Street, J.

These considerations appear to me conclusive against the contention of the suppliants that they are entitled to renewals of their licenses free from any conditions, to which they object, coming into force after the original licenses under which they claim.

It is further argued, however, that, even if this be the true construction to be placed upon their rights, the language of the Act 61 Vict. ch. 9, above set forth, applies only to licenses issued upon sales made after it was passed, and not to renewals of licenses issued upon sales made before it was passed. Had the first section of the Act stood alone, I think I should have agreed with this view; but the 4th section brings into force on 29th April, 1898, the order in council of 17th December, 1897, the first section of which requires what is called in the Act "the manufacturing condition" to be made a condition of every license or permit to cut pine timber which should be issued after the 30th April, 1898. It is urged that the injustice of interfering with the vested rights of existing licensees obliges the Court to place the strictest possible construction against the Crown upon the Act and the order in council as being *ex post facto* legislation. I do not think, however, that I should, in regard to this legislation, do more than apply to it the ordinary rules of construction.

It is not *ex post facto* legislation; it is a simple application to the undoubted rights of the suppliants of the undoubted rights of the Crown. The rights of the suppliants are to have their licenses renewed according to the conditions which at the time of renewal have been generally imposed upon license holders, and so long as renewals are offered them upon conditions which the Crown, as represented by the Provincial Governor in Council, has the power to impose, no breach of the rights of the suppliants

Judgment. is committed. It is no part of my duty to adjudicate upon the question as to whether the conditions of the order in council of December, 1897, are unduly onerous, or to criticise the discretion exercised by the Crown in imposing them. I find here in the order in council of the 17th December, 1897, a plain and unambiguous direction that every license or permit to cut timber issued on or after the 30th April, 1898, shall contain and be subject to what is called in the Act "the manufacturing condition;" and if this language is not plain enough, I find in the 5th paragraph of the order in council internal evidence that it was intended to be applicable to past as well as future sales. To construe it as the suppliants ask, I should have to apply to the word "license" in the 1st paragraph the meaning of "original license," and to treat it as not including the renewals of existing licenses, a sense in which I can not find it has ever been used, and which appears to me to be contrary to the spirit as well as the letter of the fundamental Act, chapter 23 of the Consolidated Statutes of Canada.

I can not pretend to explain why the 1st section of the Act 61 Vict. ch. 9 should have been so drawn as to be apparently applicable to future sales only, and not to past ones, but the later and entirely distinct paragraphs 2 and 4 of the same Act bring into force the orders in council of the 17th December, 1897, in which, as I have pointed out, there is no ambiguity, and which stand upon their own ground. To hold them applicable to new sales only and not to renewals also, would be to strain their language for the purpose of introducing an innovation upon the long established and invariable practice of the Department.

The remaining ground taken by the suppliants is that the Act 61 Vict. ch. 9 is *ultra vires* the Provincial Legislature, as being an encroachment upon the legislative authority reserved to the Dominion by the British North America Act.

It is declared by the 91st section of that Act that the exclusive legislative authority of the Dominion Parliament

extends to all matters coming within the classes of subjects there enumerated, the second of which is "the regulation of trade and commerce," and it is further declared by that section of the Act that any matter coming within any of the classes of subjects therein enumerated shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned by the 92nd section exclusively to the Legislatures of the Provinces.

Judgment.
Street, J.

By the 92nd section it is declared that in each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next enumerated; and the 5th of the classes of subjects then enumerated is, "the management and sale of the public lands belonging to the Province and of the timber and wood thereon."

It is proved on the part of the suppliants, in support of their contention, that for many years before the passing of the Act complained of (61 Vict. ch. 9) a very large number of pine logs had been exported from Ontario, the larger proportion of which had been cut upon the public lands of the Province, under licenses similar to those now in question. It is a matter which may readily be taken for granted that if the regulations in question be sustained, the export of logs cut under such licenses will be entirely stopped. It is further shewn that the tariffs established in the United States, from time to time, with regard to the timber trade with Canada, have been affected at times by the tariffs adopted by the Dominion bearing upon Canadian timber, or have been to some extent regulated by or been made dependent upon them. I am asked to draw from these circumstances the conclusion that the Acts and regulations of which the suppliants are now complaining are a contravention of that part of the British North America Act which reserves to the Dominion Legislature the exclusive right of making laws for the "regulation of trade and commerce," and to hold that the Provincial Legislature, under the guise of a regulation for the manage-

Judgment. ment of its timber, has in reality attempted to interfere
Street, J. with the regulation of trade and commerce.

In my opinion, the Act and regulations complained of are clearly within the powers of the Provincial Legislature, and are not in any way an interference with the regulation of trade and commerce, within the meaning of the 91st section of the British North America Act.

In the first place, it is to be borne in mind that the Provincial Legislature in passing this Act are dealing with property belonging to the Province, over which they have the fullest power of control. They are entitled to sell it or to refuse to sell it; and if they sell, they have the right, in my opinion, to impose upon the purchaser such conditions as they deem proper with regard to the destination of the timber after it is cut, including the state in which it shall be exported, just as they have the right in selling cattle from the farm at their Agricultural College to stipulate that the purchaser shall not export them alive. The condition that the timber shall be sawn into lumber before exportation in the one case no doubt reduces the quantity of logs exported, just as the supposed stipulation in the other case reduces the quantity of live cattle exported, but in each case the matter is one purely of internal regulation and management by the Province of its own property, for the benefit of its own inhabitants.

The matter, I think, may be placed beyond any question by looking at it in another way. It is clear that the right to pass the Act complained of, and the regulations accompanying it, must exist either in the Provincial or the Dominion Legislature, and if the contention of the suppliants is to be adopted, it exists in that of the Dominion. Would it be possible for a moment to contend that the Dominion Legislature, under their power of passing Acts for the regulation of trade and commerce, could enact that every license to cut timber upon the lands owned by the Province of Ontario should contain a condition that the timber should be sawn into boards before being exported? And would not such an Act, if passed by the Dominion, be

clearly an encroachment upon the exclusive right of the Provincial Legislature to pass laws for the regulation and sale of the timber on its own lands ?

Judgment.
Street, J.

The general limitations upon the powers of the Dominion Legislature to legislate with regard to the regulation of trade and commerce are indicated in the report of the judgment of the Privy Council in the case of *Citizens Ins. Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, at p. 113, where it was held that those powers do not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance, in a single Province ; but, for the reasons I have given, it appears to me that the powers exercised by the Legislature of the Province of Ontario which are questioned by the suppliants here, are so plainly within those exclusively assigned to them, that it is unnecessary to resort for guidance to any of the decided cases.

Upon the whole case I am, therefore, of opinion that the suppliants are not entitled to have their licenses renewed except upon the conditions offered by the Commissioner of Crown Lands as set forth in the orders in council in force on the 30th April, 1898 ; and that their petition must be dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

REGINA V. SMITH.

Municipal Corporations—By-law—Regulation of Hawkers—R. S. O. ch. 223, sec. 583, sub-sec. 14—Proviso—Negating Exception—Conviction—Quashing—Conts.

A by-law of a county council recited the provisions of sub-sec. 14 of sec. 583 of the Municipal Act, R. S. O. ch. 223, and that it was expedient to enact a by-law for the purpose mentioned in the sub-section; it then went on to enact "that no person shall exercise the calling of a hawker, pedlar, or petty chapman in the county without a license obtained as in this by-law provided;" but the by-law contained no such exception as is mentioned in the proviso to sub-sec. 14, in favour of the manufacturer or producer and his servants:—

Held, that the by-law was *ultra vires* the council, and a conviction under it was bad.

Held, also, following *Regina v. McFarlane* (1897), 17 C. L. T. Occ. N. 29, that the conviction was bad because it did not negative the exception contained in the proviso, and there was no power to amend it, because the evidence did not shew whether or not the defendant's acts came within it.

The conviction was therefore quashed, but costs were not given against the informant.

Statement. MOTION by the defendant to make absolute a rule *nisi* previously granted to quash the conviction of the defendant by the police magistrate for the town of Pembroke and the townships of Alice, Fraser, etc., for unlawfully exercising the calling of a hawker or pedlar, contrary to a by-law of the county of Renfrew passed on the 15th June, 1898, purporting to be pursuant to sec. 583 of the Municipal Act, R. S. O. ch. 223, which provides as follows:—

583. By-laws may be passed by the councils of the municipalities * * and for the purposes in this section respectively mentioned, that is to say: * *

14. For licensing, regulating and governing hawkers, pedlars or petty chapmen, and other persons carrying on petty trades, or who go from place to place or to other men's houses, on foot, or with any animal, bearing or drawing any goods, wares, or merchandise for sale * * and for determining the time during which the license shall be in force;

Provided always that no such license shall be required Statement.
for hawking, peddling or selling from any vehicle or other conveyance any goods, wares or merchandise to any retail dealer, or for hawking or peddling any goods, wares or merchandise, the growth, produce or manufacture of this Province, not being liquors within the meaning of the law relating to taverns or tavern licenses, if the same are being hawked or peddled by the manufacturer or producer of the goods, wares or merchandise, or by his *bond fide* servants or employees having written authority in that behalf; and such servant or employee shall produce and exhibit his written authority when required so to do by any municipal or peace officer.

The motion was heard by a Divisional Court composed of MEREDITH, C.J., and ROSE, J., on the 8th September, 1899.

Watson, Q.C., for the defendant, contended that the conviction was bad because it did not upon its face negative the exception in the proviso to sub-sec. 14, above set out, and could not be amended because the evidence did not shew that the defendant did not come within such exception, citing *Regina v. McFarlane* (1897), 17 C. L. T. Occ. N. 29, upon the authority of which case he also asked for costs.

No cause was shewn.

December 5, 1899. The judgment of the Court was delivered by

MEREDITH, C.J.:—

The conviction which is moved against was made on the 13th April, 1899, by the police magistrate for the town of Pembroke and the townships of Alice, Fraser, etc., and is for unlawfully exercising the calling of a hawker or pedlar, to wit, going from place to place and from house to house with a vehicle drawn by horses and carrying goods,

Judgment. wares, and merchandise, to wit, sewing machines, contrary
Meredith, to a by-law of the corporation of the county of Renfrew
C.J. numbered 573, in that behalf.

By-law No. 573 was passed on the 15th June, 1898; it recites the provisions of sub-sec. 14 of sec. 583 of the Municipal Act, R. S. O. ch. 223, and that it is expedient to enact a by-law for "such purpose," that is, the purpose mentioned in the sub-section; but the enacting sections of the by-law contain no such exception as is mentioned in the proviso to sub-sec. 14 to the requirement of sec. 1 of the by-law, which is "that no person shall exercise the calling of a hawker, pedlar, or petty chapman in this county without a license obtained as in this by-law provided."

The provisions of the by-law are, in our opinion, for this reason, *ultra vires*; the power conferred by the Legislature is limited by the proviso to sub-sec. 14—the power assumed to be exercised by the council is not so limited, but is general.

We decided in *Regina v. McFarlane* (1897), 17 C. L. T. Occ. N. 29, that a similar conviction was bad because it did not negative the exception contained in the proviso, and there was no power to amend it because the evidence did not shew whether or not the defendant's acts came within it.

For these reasons the conviction must be quashed.

In the circumstances of this case, in the exercise of our discretion as to costs, we do not give costs against the informant.

E. B. B.

[DIVISIONAL COURT.]

STIRTON V. GUMMER.

Libel — Evidence — Admissibility — Previous Writings — Provocation — Mitigation of Damages — Meaning of Words.

In libel for two articles which were printed in the defendant's newspaper reflecting upon the character and conduct of the plaintiff:—

Held, that an article in another newspaper, published before the first of the alleged libels, purporting to be an account of an interview with the plaintiff in which he made an attack upon the defendant's newspaper by its name, and a letter signed by the plaintiff, published in two newspapers before the second of the alleged libels, in which the defendant's newspaper and the editor thereof—not the defendant himself—were referred to in abusive language, were admissible in evidence upon the part of the defendant, in mitigation of damages.

Percy v. Glasco (1873), 22 C. P. 521, followed.

Held, also, per ROSE, J., that editorial articles which appeared on the same day in the newspapers which published the plaintiff's letter, referring to it and to the defendant's newspaper, were also admissible as furnishing provocation for the second of the alleged libels; MEREDITH, C.J., contra.

In the first of the alleged libels one of the statements made about the plaintiff was "that during an election campaign the party managers had to lock him up to keep him from disgracing them on the stump:"—*Held*, that evidence was admissible on the part of the defendant to explain the meaning of the words "lock him up."

MOTION by the defendant to set aside the verdict and judgment for the plaintiff for \$500 and costs in an action for libel tried before FERGUSON, J., and a jury at Guelph, upon the ground of the improper rejection of evidence and upon other grounds. The facts and arguments are fully stated in the judgments. Statement.

The motion was heard by a Divisional Court composed of MEREDITH, C.J., and ROSE, J., on the 8th September, 1899.

King, Q.C., for the defendant.

W. R. Riddell and *H. Guthrie*, for the plaintiff.

December 5, 1899. ROSE, J.:—

This was an action of libel, tried before Ferguson, J., and a jury, at Guelph, on the 27th March last, in which a verdict was given for the plaintiff for \$500, and judgment directed accordingly.

Judgment.

Rose, J.

As I understand the facts, they are somewhat as follows. There were published in the city of Guelph, "The Guelph Daily Advocate" and the "Guelph Daily Mercury," also the "Guelph Weekly Mercury," which papers apparently supported the views and interests of the Reform party; there were also published "The Guelph Daily Herald" and "The Guelph Weekly Herald," which supported the views and interests of the Conservative party.

The plaintiff was a Reformer; the defendant, as I understand, a Conservative.

Prior to the writing of the articles in question, there had been an election in which one Major Mutrie had been elected to the Legislature. His election had been protested, and the protest had been dismissed by consent or without evidence being offered to support the petition. The plaintiff was apparently jubilant, and, for the purpose of calling attention to the success of the Liberals and to the discomfiture of the Conservatives, went to the editor of the "Advocate" and practically dictated an article which appeared in such paper as an interview with the plaintiff by a reporter of the "Advocate." The article was headed "The Protest Aftermath." In this alleged interview the plaintiff made some strong statements with reference to the Tories, and proceeded to attack the "Herald" newspaper. I think I had better give the article in full:

"The Protest Aftermath.

"An Advocate reporter ran across a little knot of politicians this morning on the street. The subject under discussion was the dismissal of the protest against Major Mutrie, M.P.P., Friday, at Osgoode Hall. Up came Dr. Stirton, who was one of the chief Liberal fighters last election.

" 'Well, Dr.,' said one of the party, 'I suppose you are able to sleep now since the protest is settled?'

" 'Protest, be hanged,' was the reply; 'I have never lost a wink of sleep over that farce. Look here, now, haven't the Tory pushers made a nice exhibition of themselves

over this wonderful protest. After election day they yelled corruption and bribery, and frothed and fumed as if they had the hydrophobia. Why, the "Herald" went into a fit of hysterics, screaming that boodle, beer, and biscuits had won the election. All rot. Now, when they have a chance to prove a single case of bribery or a corrupt act, they back down, pay all their own costs, and admit that they were simply talking through their hats. Why they slandered Alderman Peterson and myself all over this riding, charging us with almost every crime in the decalogue. They knew that every charge was false. Yes, two or three of the Tory lawyers have done well, but you had better ask the Honest Farmer his views. It was a clean, hard fought election, and just a gentle reminder of what will occur in Dominion politics in the future.'"

Judgment.

Rose, J

This article appeared on the 24th September in the "Guelph Daily Advocate," and on the 26th September there appeared in the "Daily Herald," and on the 29th September in the "Weekly Herald," an article headed "Don't Get Gay." This article was written not by the defendant but by his editor, and was as follows: "This other fellow was a brilliant but erratic individual, particularly the latter. Some years ago it is related that during an election campaign the party managers had to lock him up to keep him from disgracing them on the stump. During another campaign this worthy party heeler was director of ceremonies at all the select private festivals held in the interests of the candidate. One time he was heard of leading the waltz in a noted Essex street rendezvous, with the most 'regal' looking coloured lady in the city on his arm, and a half barrel of beer on the table. On another occasion he would be announced as the toastmaster at an 'evening' near the ball park, pledging fidelity to the Liberal cause and devotion to the 'silver-haired' hostess in a bumper of Key West."

On the 27th September a letter appeared in the "Advocate" from the plaintiff, and also in the "Guelph Daily Mercury" and the "Guelph Weekly Mercury" in the

Judgment. issues of such paper of the 27th September. This letter
Rose, J. was as follows—the heading was not put there by the
plaintiff but by the editor :

The “Herald” Slander.

“To the Editor of the ‘Advocate’: Sir:—Your valued paper of last Saturday contained a few remarks I made to your reporter in reference to the late protest in South Wellington. These were made in a casual off-hand way, and I can’t see that they contain anything that I regret. It has been, however, too much for the ‘Herald,’ and Monday night its editor writes an article attacking me, which, for pure journalistic cowardice, base insinuation, and falsehood, has rarely been equalled in the annals of newspaper life in this city. The editor of the ‘Herald’ has cunning, however.” And then follows an attack upon the editor, referring to him as the “Herald editor” or the “editor of the Herald” in very strongly abusive language. On the 29th September the “Herald” replied in doggerel rhyme, the substance of the rhyme being substantially the same as the article of the 26th September. There appeared in both the “Advocate” and the “Mercury,” on the same date as the publication of the plaintiff’s letter, editorials referring to the letter, and also to the “Herald” newspaper.

For the articles appearing in the “Herald” the plaintiff has brought this action against the defendant, the publisher and proprietor.

The articles to which I have referred, as well as the editorials, were set out in the pleadings. The defendant contended that he had a right to have go before the jury the whole of the articles, including the editorials, as foundation for an argument before them that the articles written in the “Herald” were merely fair comment, or, if not, in mitigation of damages. The learned Judge admitted the alleged interview published on the 24th September, but refused to admit the letter written by the plaintiff, on the ground that it attacked not the defendant but the editor, and also refused to admit the editorials.

The defendant now moves for a new trial, alleging error in such ruling. He also urges as error the refusal by the learned Judge to allow the defendant to give evidence of the meaning of the words "lock him up" in the article headed "Don't Get Gay," the learned Judge stating that the words could have but one meaning only, his language being "It means 'put him in the lock-up.'"

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Rose, J.

I am unable to see any ground upon which the refusal to allow the letter to be given in evidence can be supported. I think it is drawing too fine a distinction to say that when the "Herald" was attacked, as it was in the alleged interview and subsequently in the plaintiff's letter, as will appear by the opening sentences, because the attack by the plaintiff was subsequently confined to the editor, the letter is not admissible. And, even had the letter not referred to the "Herald" in terms, but only to the editor of the "Herald," I should be of opinion that it was admissible. The four articles,—I am not now speaking of the editorials,—were all the outcome of the attack made by the plaintiff upon the "Herald" newspaper, and, although the answer to the attack was vicious and couched in language suggesting the lowest of thoughts and the most degrading of actions, I cannot see why the jury should not have had the whole of the articles placed before them for the purpose of determining what manner of man the plaintiff was—the language he used in attacking the "Herald"—to enable them to judge whether it lay in his mouth to complain very bitterly if, having used coarse and offensive language with reference to the "Herald" and its editor, he should be answered in terms.

I am further of opinion that the connection between the publisher and proprietor of the "Herald" and the editor is too close to enable the plaintiff, after having attacked the newspaper and its editor, to have withheld from the jury such attack, because he says that that is a matter between himself and the editor only. Nor does it seem to me to make any difference that the letter afforded a cause of action to the editor, for it might well at the same time

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be a provocation to the defendant or to those who had charge of the newspaper, and be defamatory of a third party, and I think that it might well be used by the defendant to cut down the damages which he would have to pay as being the provocation which caused the writing of the articles in question, although it afforded a cause of action to the editor, if unjustifiable statements were made respecting him personally.

I am at a loss to see why a defendant in an action of slander or libel may not ask to have the jury put in possession of all the facts which would shew what moved him to make the statements complained of. Whether such facts would appear to the jury to be in aggravation or in mitigation, would be for them to consider.

The defendant might well say: "I have been at fault, I admit my fault, but my conduct has not been so malicious as it would otherwise appear, because I was incited to it by something that the plaintiff said; I admit that what he said afforded no justification for my language, but I do urge that, having regard to the frailty of human nature, the provocation I received makes my conduct appear in a light not so bad as it would have appeared in had I, maliciously, wantonly, and without any provocation, used the language of which complaint is made." I think, therefore, the letter in question should have been admitted in evidence.

The giving in evidence of the interview and the letter was urged on the ground that the "Herald" articles were fair comments. I should not be inclined to interfere on any such ground, for I do not see how any reasonable man could conclude that they were fair comments. It may be that technically the defendant had the right to have them go before the jury so that he might argue that they were fair comments, but if the jury had found for the defendant on that ground, I do not see how the finding could be supported. But on the ground that the defendant was entitled to have the interview and the letter go before the jury as evidence in mitigation of damages, I think the motion must succeed.

I am also of opinion that the learned Judge was in error in ruling that the meaning that he placed upon the words "lock him up" was the only meaning that they could bear, and in rejecting evidence of any other meaning. If I had to find the fact as to the meaning of the words, I do not think I could accept the meaning which my learned brother put upon them. It seems to me that they are open to a different meaning, and I favour that suggested by the defendant, namely, that the plaintiff was not allowed to speak at political meetings, or, as somewhat graphically expressed at the trial, that "they put a padlock on his tongue." Whether this objection by itself would on the facts of this case be sufficient ground for granting a new trial, I much doubt.

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Rose, J.

I have had more doubt as to the defendant's right to have the editorials placed before the jury. It may be that it is a fair inference from the plaintiff's own examination for discovery and at the trial that these editorials were instigated by him; that his connection with newspaper work was such that it might fairly be inferred that he would have reason to believe that the publication of his letter would be accompanied by editorials, and that, while he may not be liable for any libellous statements made in such editorials, it would only be fair to the defendant for the jury to have before them the words used by the plaintiff's agents to whom he intrusted the publication of his letter to the world, at the time that such agents did so publish the letter.

But, apart from such considerations, I think they were admissible. If a man were on his trial on a charge of murder, could he not shew that being suddenly and without warning assaulted, receiving a severe blow in the face, he, blinded by pain and passion, mistook the deceased for his assailant, and striking him killed him? The deceased in such a case would not in any wise be responsible for the blow which caused the pain and anger, and yet can any one doubt that to measure the gravity of the offence it would be proper to consider the circumstances under which

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the death was caused ? Again, if a newspaper had attacked a man in a series of articles, and a third person had written a letter to the same paper continuing the attack, and the person thus attacked had answered in an article defaming such third person, could he not, defending an action by such third person, give in evidence in mitigation of damages the writing of the previous newspaper articles as well as the letter ? This must, I think, be admitted, and yet the plaintiff in such an action would neither have written nor inspired the articles. It must be remembered that damages are given not only to compensate the plaintiff, but also to punish the defendant, to impose a penalty on "an exhibition of spite and ill will" (Odgers, p. 292), and to measure justly the misconduct one must know the exciting cause. I do not see how such evidence could lessen the damages to be awarded to the plaintiff to compensate him for the injury sustained by him. For such damages the defendants must be responsible if caused by his unlawful act.

The distinction between compensatory and punitive damages is pointed out in Odgers, at pp. 301, 302, as follows : "But in all cases, the absence of malice, though it may not be a bar to the action, may yet have a material effect in reducing the damages. The plaintiff is still entitled to reasonable compensation for the injury he has suffered ; but if the injury was unintentional, or was committed under a sense of duty, or through some honest mistake, clearly no vindictive damages should be given." It is clear, therefore, that the fact that the act sought to be given in evidence was not the act of the plaintiff is not the test of its admissibility.

On the whole I think that the editorials should have been submitted to the jury to enable them to ascertain how the defendant was situated, against what his paper was defending itself, and the extent of his misconduct for which punishment should be awarded. Otherwise I do not see how they would be able to determine the amount of damages that fairly and justly the defendant should pay.

Since writing the above, I have read the judgment in *Percy v. Glasco* (1873), 22 C. P. 521, and it seems to me that all I have said is in strict accordance with the judgment of the Court as delivered by Hagarty, C. J. I do not see that I have stated any new proposition.

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Rose, J.

I think the defendant fails on the other grounds taken in his notice of motion. None was urged before us save the one as to special damage, which we disposed of on the argument.

For these reasons, I think the verdict must be set aside and the case sent back again for a new trial, and, as the plaintiff insisted upon his right to have the letter and the editorials excluded, I think the costs of the motion and of the former trial must be costs in the cause to the defendant in any event.

MEREDITH, C.J.:—

Mr. Riddell's argument that the prior publications by the plaintiff defamatory of the defendant, tendered in evidence by his counsel at the trial and rejected by my brother Ferguson, were inadmissible in evidence, even in mitigation of damages, certainly finds strong support in the decisions of the American Courts.

The provocation which is admissible in evidence, according to those decisions, must be not only matter relevant to the defamatory statements complained of, but the publication must have been made in a moment of heat and passion induced by the immediately preceding acts of the plaintiff: *Townshend on Slander and Libel*, 4th ed., par. 414; *Sheffill v. VanDeusen* (1860), 15 Gray (81 Mass.) 485; *Heiser v. Loomis* (1881), 47 Mich. 16; *Keiser v. Smith* (1882), 71 Ala. 481; 46 Am. Rep. 342; *Quimby v. Minnesota Tribune Co.* (1888), 38 Minn. 528.

The principle upon which such evidence is admissible is stated to be the same as that upon which evidence of provocation is received in cases of homicide, and it follows, it is said, that if there has been time and opportunity for

Judgment. "hot blood to cool" and calm reason to resume its ordinary control, a mere provocation not connected with the wrong complained of cannot be shewn.
Meredith,
C.J.

In *Sheffill v. VanDeusen*, which was an action for slander, evidence of provocation on the evening of the day before that on which the slander complained of was uttered was held to be inadmissible.

In *Keiser v. Smith* evidence of a libel on the defendant published in the morning of the day on which the assault complained of was committed, was rejected, it being held that the provocation was not so recent and immediate as to induce a presumption that the violence complained of was committed under the immediate influence of the passion excited by it.

The learned Judge who delivered the judgment of the Court referred to *Fraser v. Berkeley* (1836), 7 C. & P. 621, as the only adjudged case to the contrary which he had found, and, speaking of that case, said that the libel was there admitted in mitigation of damages in entire disregard, as the Court thought, of sound reason and the wise policy of the law. "I am aware," he added, "of no case in England or America where it has been since approved."

It seems to be agreed that the principle upon which such evidence is admitted in actions for defamation is the same as that in accordance with which it is held to be admissible in cases of assault.

The English authorities, though they are not uniform, and appear to be somewhat conflicting, do not restrict the evidence within such narrow limits as do the American decisions.

In *Finnerty v. Tipper* (1809), 2 Camp. 72, Sir James Mansfield admitted evidence of defamatory matter published by the plaintiff of the defendant before the libel complained of in mitigation of damages.

In *May v. Brown* (1824), 3 B. & C. 113, Chief Justice Abbott refused to admit evidence of libels by the plaintiff of the defendant even in mitigation of damages, although he did admit general evidence that the plaintiff had

libelled the defendant before the publication by the defendant of the libel complained of.

Judgment.
Meredith,
C.J.

The Court *in banc* affirmed the ruling of the learned Chief Justice on the ground that to admit such evidence would be unfair to the plaintiff, as on the pleadings he had no notice of such a defence, and also because of the inconvenience by leading to a multiplication of inquiries, not, as it was said, relevant to the issue joined between the parties.

From what is said in argument and by Mr. Justice Bosanquet in *Tarpley v. Blabey* (1836), 2 Bing. N. C. 437, it would appear that the matter offered in evidence in *May v. Brown* was not published anterior to the publishing of the libel complained of, though I have not been able to find any confirmation of this in either of the reports of that case (3 B. & C. 113; 4 D. & R. 670).

In *Wakley v. Johnson* (1826), Ry. & M. 422, Chief Justice Best, in rejecting general evidence of prior libellous publications by the plaintiff, spoke of *May v. Brown* as deciding that evidence of particular libels was inadmissible.

In *Watts v. Fraser* (1835), 7 C. & P. 369, which was a libel action, Lord Denman admitted as evidence in mitigation of damages other libels by the plaintiff of the defendant—some of them published a month or two and some very recently before the libel complained of by the plaintiff.

In the note to the last case, *Judge v. Berkeley* is referred to as an action for assault in which Mr. Justice Burroughs admitted in mitigation of damages evidence of a series of libellous articles respecting Colonel Berkeley in the plaintiff's newspaper, one of them having been published on the day of the assault.

Watts v. Fraser afterwards came, on a motion for a new trial, before the full Court, by which it was held that the defendant in an action for libel may shew in mitigation of damages that he was provoked to issue the libel by publications by the plaintiff reflecting on him: (1837), 7 A. & E. 223.

Judgment.
Meredith,
C.J.

In argument counsel for the defendant (Sir John Campbell, Atty.-Gen., Sir F. Pollock, and Barstow), admitted that there was no doubt that the prior publications complained of by the defendant were admissible in evidence in mitigation of damages if they were introduced by regular proof.

In *Tarpley v. Blabey*, already referred to, it was held that, in order to justify the admission in evidence of libels by the plaintiff in mitigation of damages, it must be shewn with precision that the libels relate to the libels by the defendant.

In that case it was not shewn that the libels offered in evidence were published before the libel by the defendant for which the action was brought, and a rejection at *nisi prius* of evidence of them was on that ground affirmed.

Chief Justice Tindal speaks, at p. 441, of the necessity of the libel offered in evidence being "connected with the libels proceeding from the defendant," not meaning, as I understand his judgment, dealing with the same subject-matter, but connected as tending to provoke the defendant and having provoked him to publish the libel of which the plaintiff complained.

Mr. Justice Gaselee, at p. 443, however, seems to have thought that the libels to be admissible must relate to the same subject-matter, agreeing in this respect with the view of the Court in *Quimby v. Minnesota Tribune Co.* (1888), 38 Minn. 528.

In *Fraser v. Berkeley* (1836), 7 C. & P. 621, which was an action for assault, Lord Abinger admitted evidence of a libel on the defendant and his family to be given in mitigation of damages, although it was the subject of another action, and the assault had been committed two or three days after the publication of the libel.

From 1837 down to 1866 the question does not seem again to have been raised in the English Courts.

In 1866 it was referred to by Mr. Justice Blackburn in *Kelly v. Sherlock* (1866), L. R. 1 Q. B. at p. 698, where he

says: "Now, there can be no set-off of one libel or misconduct against another; but in estimating the compensation for the plaintiff's injured feelings, the jury might fairly consider the plaintiff's conduct and the degree of respect which the plaintiff himself had shewn for the feelings of others."

Judgment.

Meredith,
C.J.

The leading English text writers who deal with the question do not state the law in quite the same terms. In *Mayne on Damages*, 6th ed., p. 500, it is said that evidence that the plaintiff libelled the defendant, though no defence to an action of libel, will go in reduction of damages, but such libels must be shewn to relate to the subject-matter of those published by the defendant, and for the latter proposition *May v. Brown* and *Tarpley v. Blabey* are cited.

In *Taylor on Evidence*, 9th ed., par. 344, dealing with what a defendant may shew to palliate his act of publishing a libel, the author says that a defendant may shew that he had been provoked to act as he had done by the conduct of the plaintiff, who had previously published libels of him respecting the same subject-matter which had only recently come to the knowledge of the defendant, for evidence of provocation by libels on the defendant is admissible not on the ground of any right to set off one libel against another, but from an indulgent consideration of the weakness which sometimes leads an angry man to say "that he should be sorry for."

Mr. Odgers seems to treat the rule as broader than is stated by Mr. Mayne or Mr. Taylor (*Odgers's Law of Libel and Slander*, 3rd ed., 364). After referring to Mr. Justice Blackburn's language in *Kelly v. Sherlock*, he says: "Thus, evidence is admissible in mitigation of damages to shew that the plaintiff had previously himself libelled or slandered the defendant, provided it be also shewn that this had come to the defendant's knowledge and occasioned his attack on the plaintiff. * * * But not if such previous libels refer to other matters and did not provoke that sued on."

Judgment.
Meredith,
C.J.

Mr. Folkard, quoting from Mr. Justice Blackburn's judgment in *Kelly v. Sherlock*, says that "in estimating the damages, the jury may fairly consider the conduct of the plaintiff, and the degree of respect he himself has shewn for the feelings of others," and expresses the opinion, citing *May v. Brown*, that at most the defendant cannot be allowed to do more than prove the publication of libels by the plaintiff which are connected with the libel which is the subject of the action, and therefore, he says, libels published by the plaintiff of the defendant of an earlier date, and in direct relation to the libel declared on, may be given in evidence for the purpose of mitigating the damages; as where such previous libels constitute the provocation to the principal libel: Folkard's Law of Slander and Libel, 6th ed., pp. 547-48.

Mr. Fraser's statement of the law is as follows: "And defendant can prove in mitigation of damages that plaintiff had, prior to the publication of the libel complained of, libelled or slandered the defendant, provided that he can also prove that this provoked him to retaliate by publishing the libel sued for, but not otherwise:" Fraser's Law of Libel and Slander, 2nd ed., p. 170.

Percy v. Glasco (1873), 22 C. P. 521, is the only reported case I have been able to find in which the question for decision has been considered by the Courts of this Province.

The action was for assault, and it was held that evidence of libellous and abusive articles reflecting on the defendant published on the day of and preceding the assault in a newspaper of which the plaintiff was the proprietor, were admissible in evidence in mitigation of damages. That conclusion was reached upon the broad general principle that a defendant may in order to mitigate damages for an act which he is unable to justify give in evidence the recent conduct of the plaintiff towards him in order to shew that his act was not wholly unprovoked but was committed while he was smarting under the provocation he had recently received at the hands of the plaintiff.

Notwithstanding the varying and somewhat conflicting cases and opinions which I have quoted, we are, I think, bound to follow *Percy v. Glasco*, which seems to me to have been rightly decided both upon principle and authority.

Judgment.
Meredith,
O.J.

To require that the defamatory matter offered in evidence by a defendant in mitigation of damages, to be admissible, should deal with the same subject-matter as that dealt with by the libel of which the plaintiff complains would be inconsistent with the principle of the decision in *Percy v. Glasco*, and I can see no good reason why the right should be so limited. I can understand that the act of the plaintiff sought to be given in evidence ought to appear to be the inducing cause of or provocation for the wrongful act of the defendant, and that in that way the matter complained of and that urged in mitigation ought to be connected, but beyond that, as it seems to me, the limitation ought not to be extended.

The language of Con. Rule 488 gives some support to this view, as it recognizes the right of a defendant to give evidence with a view to mitigation of damages as to the circumstances under which a libel or slander was published.

The letter of the plaintiff tendered by the defendant should, in my opinion, have been admitted in evidence in mitigation of damages on the issue as to libel complained of which was afterwards published.

I do not understand that my learned brother rejected the letter upon the ground with which I have dealt, but rather because in his opinion it was defamatory not of the defendant but of the editor of his newspaper, and was therefore *res inter alios acta*. In that view I am unable to agree. The attack, though mainly on the editor, referred to the newspaper by name, and was calculated to injure the defendant, and perhaps as likely to provoke him to retaliate as if the attack had been made on him personally. It may be observed, too, that the editor is not referred to by name, and it may well be that readers of the newspapers in which the letters appeared would understand them as referring to the defendant, who was the publisher,

Judgment. and, for all they may have known, the editor, of the
Meredith, newspaper.
C.J.

I do not see my way clear to differ from the ruling as to the admissibility of the editorials which appeared in the two newspapers in which the letter was published, and which referred to and commented on it. The plaintiff did not write them or direct them to be written; they were acts done by third persons for whose acts he was not responsible; and they were not, as it appears to me, admissible upon the most liberal construction of the rule of evidence which I have been considering.

I am unable to agree with the ruling as to the words "lock him up" appearing in one of the alleged libels. The meaning of the words was a question for the jury, and I cannot agree that the only meaning of which the words mentioned were susceptible was that physical restraint had been applied to the plaintiff—assuming that the ordinary sense of them was that, evidence was admissible of previous occurrences, conversations, or other matters, to explain them, and that having been given, it was competent for the defendant's counsel to ask witnesses what they understand by the words: *Folkard*, pp. 466-67: or, as put by Chief Baron Pollock in *Daines v. Hartley* (1848), 3 Ex. at p. 206, a witness may be asked, "Was there anything to prevent those words from conveying the meaning which ordinarily they would convey?" Because if there was, evidence of that may be given; and then the question may be put. When you have laid the foundation for it, the question may then be put, "What did you understand by them?"

There must, in my opinion, be a new trial, and the costs of the last trial and of this motion should be costs to the defendant in any event.

[The Court directed the question of the admissibility of the two editorials to be reargued, unless the defendant elected and undertook not to offer them in evidence, which he subsequently did.]

RE MEDLAND AND CITY OF TORONTO.

Municipal Corporations—Local Improvements—Block Pavement—Liability to Repair—Reconstruction—R. S. O. ch. 223, sec. 666—62 Vict., sess. 2, ch. 26, sec. 41.

A city corporation having, by by-law passed in 1888, adopted the local improvement system, a cedar block pavement was constructed as a local improvement in 1891, its "lifetime," as stated by the by-law for levying the assessments therefor, being ten years.

Sections 664 and 665 of the Municipal Act, R. S. O. ch. 223, authorize the passing of by-laws providing for the construction of local improvements and the making of assessments therefor.

Section 666 provides that "nothing contained in the two preceding sections shall be construed to apply to any work of ordinary repair or maintenance, and all works or improvements constructed under the said sections shall thereafter be kept in a good and sufficient state of repair at the expense of the * * city * * generally."

Held, that what the legislature contemplated was that the initial cost of the construction of the local work or improvement should be borne by the owners of the property benefited by it, but that they should not be responsible for the keeping of it in repair, that duty being cast upon the municipality generally, and that when it should become necessary to reconstruct the work or improvement, the cost of doing so should be defrayed by the owners of the property benefited by the work of reconstruction.

Held, also, that this duty to repair is imposed upon the municipality for the benefit of those at whose expense the work or improvement has been made; and is not to be confounded with the general duty to repair, which is one towards the public.

Held, also, that this duty ends when it becomes necessary to reconstruct the work or improvement, and that whenever it is in such a condition that practical men would say of it that it is worn out and not worth repairing, no order for repair can be made under the amendment to sec. 666 contained in sec. 41 of 62 Vict., sess. 2, ch. 26.

Semle, that if the dilapidated condition of the pavement were due to the municipality having in the past neglected the duty to repair, the result would be different, the amending Act of 1899 being applicable to cases where the breach took place before it was passed.

THIS was an application by William A. Medland, under **Statement.** sec. 666 of the Municipal Act, R. S. O. ch. 223, as amended by 62 Vict., sess. 2, ch. 26, sec. 41, for an order respecting the keeping of the pavement on Prince Arthur avenue, in the city of Toronto, in such a state of repair as was reasonable and proper and as was required by the section.

The municipality had, under the authority of the Municipal Act, adopted the local improvement system, having on the 7th May, 1888, passed a by-law for that purpose under the provisions of the Act then in force now contained in sec. 682 of R. S. O. ch. 223.

Statement. The pavement as to which the application was made was constructed as a local improvement in the year 1890 or 1891. It was what was called "a block pavement," and was composed of cedar blocks, circular in form, and seven inches in length, laid upon a bed of clean gravel, the roadway having been first graded to the proper level with wooden curbing on each side of it.

The number of years during which it was provided that the assessment should be levied to pay for the cost of the improvement was ten, counting from the 1st January, 1891, which was stated in the by-law for levying the assessments (No. 2889) to be "the remainder of the life-time of the payment, as certified by the city engineer."

The following statutory provisions are applicable:—

R. S. O. ch. 223, sec. 664.—The council of every township, city, town and village may pass by-laws for the following purposes :

1. For providing the means of ascertaining and determining what real property will be immediately benefited by any proposed work or improvement, the expense of which is proposed to be assessed, as hereinafter mentioned, upon the real property benefited thereby; and of ascertaining and determining the proportions in which the assessment of the cost thereof is to be made on the various portions of real estate so benefited.

* * * * *

3. For regulating the time or times and the manner in which the assessments * * are to be paid, and for arranging the terms on which persons assessed * * may commute * * .

4. For effecting any such work or improvements as aforesaid with funds provided by persons desirous of having the same effected.

* * * * *

Sec. 665.—(1) The special rate to be so assessed and levied shall be an annual rate according to the frontage thereof, upon the real property immediately benefited by the work or improvement.

* * * * *

Sec. 666.—Nothing contained in the two preceding sections shall be construed to apply to any work of ordinary repair or maintenance; and all works or improvements constructed under the said sections shall thereafter be kept in a good and sufficient state of repair at the expense of the township, city, town, or village generally. Statement.

By sec. 41 of 62 Vict., sess. 2, ch. 26, the following clause is added to sec. 666:—

And any ratepayer whose property adjoins, and who has been assessed for the said work or improvements, may, on giving one month's notice to the said municipality that the said works or improvements are not in such good and sufficient state of repair, apply by a summary proceeding to a Judge of the High Court of Justice, or to a County Judge having jurisdiction in such municipality, for an order respecting the keeping of the said works or improvements in such a state of repair as may be reasonable and proper and as is hereinbefore required.

The motion was heard by MEREDITH, C. J., in Court, on the 3rd October, 1899.

F. A. Hilton and *S. B. Woods*, for the applicant, contended that it was the duty of the corporation to repair the pavement, citing *Hammett v. Philadelphia* (1870), 65 Pa. St. 146, 155; *The People v. City of Brooklyn* (1856), 21 Barb. 484, 488; *McCormack v. Patchin* (1873), 53 Mo. 33; *Regina v. Inhabitants of High Halden* (1859), 1 F. & F. 678; *Regina v. Inhabitants of Greenhow* (1876), 1 Q. B. D. 703; *Rex v. Inhabitants of West Riding of Yorkshire* (1770), 5 Burr. 2594; *Rex v. Inhabitants of County of Bucks* (1810), 12 East 192; *Burgess v. Northwich Local Board* (1880), 6 Q. B. D. at p. 276; *Bullock v. Dommitt* (1796), 6 T. R. 650; *Proudfoot v. Hart* (1890), 25 Q. B. D. 42, 49; *Brooks v. Corporation of Haldimand* (1878), 3 A. R. 73.

Fullerton, Q.C., for the corporation of the city of Toronto, contended that the evidence established that the pavement was worn out, and that the reconstruction of it

Argument. should not be imposed upon the corporation as a repair, citing *Broadway Baptist Church v. McAtee* (1871), 8 Bush 508 ; *The State v. Corrigan Consolidated Street R. W. Co.* (1884-5), 85 Mo. 263 ; *Farrar v. City of St. Louis* (1883), 80 Mo. 379.

December 13, 1899. MEREDITH, C.J. (after stating the facts as above):—

The evidence adduced upon the motion shews that the pavement is now in a very dilapidated condition and worn out, and the contention of the corporation is that it is so dilapidated and worn out that it is impossible to repair it, and that to put the roadway in a proper state of repair new blocks must be provided throughout the whole extent of the pavement, and the whole work, except the substratum on which the blocks are laid, be practically renewed.

That this is the condition of things is practically undisputed, and there is uncontradicted evidence on the part of the corporation that such a pavement as the one in question cannot be repaired ; that from its nature it gradually decays and deteriorates until at length all the blocks, or substantially all of them, become so decayed as to render necessary the reconstruction of the whole pavement. According to the evidence of the corporation, the fate of such a pavement is not unlike that of the "Deacon's wonderful one-hoss shay," though in the case of that celebrated vehicle the form which its final dissolution took was due to the inherent strength of the material of which it was built, while in the case of this pavement to the inherent weakness of its parts seems to be attributable its present unfortunate condition.

I am unable, however, to find as a fact that, as one of the deponents who made affidavits on the part of the corporation testified, the gravel bed upon which the blocks were laid formed no part of the pavement. In my opinion, it was an integral part of it. The gravel bed and the blocks together constituted the pavement, as, if it were

otherwise doubtful, the contract and specifications taken in connection with the by-law clearly shew.

Judgment.

Meredith,
C.J.

The question for decision is a most important one, involving as it does the proper construction of the local improvement provisions of the Municipal Act regulating the incidence of the burden of maintaining works and improvements constructed or made under the authority of those provisions.

Section 666 relied on by the applicant reads as follows :
“ Nothing contained in the two preceding sections shall be construed to apply to any work of ordinary repair or maintenance, and all works or improvements constructed under the said sections shall thereafter be kept in a good and sufficient state of repair at the expense of the township, city, town, or village generally ;” and, as his counsel contended, imposes upon the municipality the duty of maintaining the works or improvements, though to do so may require the entire renewal of them ; in other words, their contention is that once such a work or improvement is made, the duty of maintaining it forever afterwards at the general expense is cast upon the municipality.

As the corresponding provision stood in the Municipal Act in 1859, its language was more favourable to the contention of the applicant than is that of the present section.

In the Consolidated Statutes of Upper Canada, the provision is as follows :

“ Nothing contained in the sections of this Act numbered 299 to 303 shall be construed to apply to any work of ordinary repair or maintenance ; and every common sewer made, enlarged, or prolonged, and street, lane, alley, public way and place, and sidewalk therein, once made, opened, widened, prolonged, altered, macadamized, paved or planked, under the said sections of this Act, shall thereafter be kept in a good and sufficient state of repair at the expense of the city generally :” Ch. 54, sec. 304.

The provisions of this section remained practically unchanged, except that the operation of them was extended to towns and incorporated villages, until the Act of 1883

Judgment. (46 Vict. ch. 18 (O.)) was passed, when the language was altered so that the section was made to read as follows:
Meredith,
O.J.

"Nothing contained in the preceding sub-sections shall be construed to apply to any work of ordinary repair or maintenance; but all works constructed under the said preceding sub-sections shall thereafter be kept in a good and sufficient state of repair at the expense of the city, town, or village generally:" Sec. 612, sub-sec. 3.

It will be observed that, according to the provisions of the section as it appeared in the Consolidated Statutes, it is the street which has been paved that it is made the duty of the municipality to repair, while under the Act of 1883 it is the "work," and under sec. 666 of the present Act it is the "works or improvements," which are to be kept in repair at the general expense.

It is not without significance that at the time when this change was made the provisions of the local improvement section to which reference is made in the section in question were changed so as to authorize the passing of by-laws "for reconstructing as well as constructing" any work to which those sections then extended.

It is, I think, at all events since the Act of 1883 was passed, impossible to construe the section in question as imposing on the municipality generally so great a burden as would rest upon it if the applicant's contention were given effect to. It seems to me to be reasonably clear that what the Legislature contemplated was that the initial cost of the construction of the local work or improvement should be borne by the owners of the property benefited by it, but that they should not be responsible for the keeping of it in repair, that duty being cast upon the municipality generally, and that when it should become necessary to reconstruct the work or improvement, the cost of doing so should be defrayed as the cost of construction had been,—by the owners of the property benefited by the work of reconstruction.

The provisions to which I have referred, as well as those of sub-sec. 2 of sec. 617 (I refer to the Act of 1883)

which was then for the first time enacted, appear to me to be consistent with one another only if the intention of the Legislature was what I have said I understand it to have been. That sub-section limited the period for borrowing money to provide for paying for the work or improvement to one within the probable life of it as certified by the engineer or other proper officer to be appointed by the council for the purpose of so certifying.

It may be that the provisions appearing in the Consolidated Statutes of Upper Canada were enacted not with the view of imposing a new duty on the municipality towards the property owners at whose expense the work or improvement should be made, but for the purpose of making it clear that the fact of the work or improvement having been made at their expense, was not intended to absolve the municipality from its general duty to repair under the section which cast the duty of keeping in repair the highways within its jurisdiction on the municipality, or any other duty resting upon it as to the repair of the work or improvement.

I do not however think, especially having regard to the amendment made at the last session of the Legislature, that that is the way in which the provision is to be construed. It does, I think, impose the duty, whatever may be the extent of it, on the municipality, for the benefit of those at whose expense the work or improvement has been made.

So treating it, the duty must not be confounded with the general duty to repair, which is one towards the public, and the cases referred to by counsel dealing with the nature and extent of that duty do not appear to me to give much assistance towards solving the question which has to be dealt with in this case.

Looking at the different provisions to which I have referred, I have come to the conclusion that the duty of the municipality to repair imposed by sec. 666, whether it may or may not sooner terminate, ends when the time arrives when it becomes necessary to reconstruct the work

Judgment.

Meredith,
C.J.

Judgment.
Meredith,
C.J.

or improvement, and that whenever it is in such a condition that practical men would say of it that it is worn out and not worth repairing, the municipality cannot be compelled to do that which is, *ex hypothesi*, impossible to be done.

Granting this to be the correct rule to be followed, in applying the provisions of the section, it is manifest that there will be much difficulty in applying them to the particular circumstances of each case, and it would perhaps have been well had the Legislature limited the period during which the duty to repair should continue to that which should have been certified to be the probable life of the work or improvement, or otherwise more clearly defined the extent of the duty intended to be imposed.

I can well understand that in the case of an asphalt pavement, consisting of a surface of asphaltum resting upon a concrete bed, the obligation to repair would extend to the renewing of the asphaltum, even if it were necessary to renew it entirely, and in the case of a macadam roadway, that as long as the foundation remained the resurfacing the roadway would be a work of repair within the meaning of the section, or in the case of a plank sidewalk, that if a sleeper or a plank became decayed or was destroyed, the municipality would be liable to replace it, not necessarily with a new one, but so that the whole work would be left in a good and sufficient state of repair.

In the case of this block pavement, however, upon the evidence before me, I do not think that the doing of what is required to be done to put the roadway in the condition in which, according to the contention of the applicant, it should be, is a duty resting on the corporation under the section. It is reasonably clear, I think, that there is nothing remaining of the pavement which can be repaired; it is worn out, and the only thing to be done is to reconstruct it or to replace it by something else. It is true that the gravel bed remains, and for all that appears is in good condition, but it is so insignificant a part of the whole work that I do not think it can be reasonably said that

there is a block pavement in existence which can be repaired, in the sense in which, in my judgment, the word "repair" is used in the section. To construe and apply the section as I am asked to do, would result in casting on the municipality the duty of forever maintaining the pavement in question, though when the construction of it was undertaken its span of life was estimated to be not more than ten years.

Judgment.
Meredith,
C.J.

Had it appeared that the present condition of the pavement was due to the municipality having in the past neglected the duty to repair, it may be that the answer to the motion which I decide to be a sufficient one, might not have been any answer, for, as at present advised, I see no reason for holding that the remedy for the breach of duty imposed which the Act of last session provided may not be applied to cases where that breach took place before the Act was passed. The uncontradicted evidence, however, though but for it I should have thought otherwise, shews, as I have said, that it is practically impossible to repair such a pavement as that in question when decay of the blocks of which it is composed sets in, and the case is not therefore on the evidence one in which the present condition of the roadway is due to any past default of the corporation.

The application must, in my opinion, be refused, but, as the question raised is new, as well as of general importance, I dismiss it without costs.

E. B. B.

RE GIBBONS.

Husband and Wife—Separate Estate—Wife's Funeral Expenses.

The separate estate of a married woman is liable for her funeral expenses.

Statement. THIS was an application made under Rule 972 by the administrator of the estate of Emma Gibbons, deceased.

The administrator, with the consent of the official guardian, had sold the property of the estate; and the object of the application was to ascertain whether the deceased's funeral expenses should be paid out of her estate; or whether they were chargeable against the deceased's husband. These expenses had been paid by George Ganderton, a relative of the deceased, who claimed that he was entitled to repayment by the administrator. The husband's residence was unknown.

September 15th, 1899. *John Hoskin*, Q. C., for the administrator and infant.

Holman, Q. C., for the creditors.

September 30th, 1899. *ROSE, J.* :—

This is an application by one George Ganderton, of Philadelphia, in the State of Pennsylvania, for payment out of the estate of deceased, being administered in Ontario under letters of administration granted to one Johnston Wilkinson, of the town of Sarnia, of the funeral expenses of Mabel E. Gibbons, incurred by him.

The said Mabel E. Gibbons at the time of her death left her surviving her husband, John P. Gibbons, and one child, an infant about eight years of age. Shortly after her death, her husband left Philadelphia and went to parts unknown. He was said to be insolvent, and it appears upon the material that there is no property out of which this claim can be made save a house and lot in the town of Sarnia belonging to the deceased at the time of her death.

I have looked at the cases collected in the American Law of Administration, (Woerner), 2nd ed., vol. 2, paragraph 762; Crawley's Law of Husband and Wife (1892), p. 55; Eversley's Law of Domestic Relations, 2nd ed., p. 276; and the reasoning in the cases referred to, especially *McClellan v. Filson* (1886), 44 Ohio St. R. 184, at pp. 188-91, and *Re McMyn* (1886), 33 Ch. D. 575, and have come to the conclusion that it is the duty of the administrator to pay this debt. I see no reason why, when a married woman dies seized of separate estate, that estate should not be charged with the burthen of her funeral expenses, as well as where a man dies leaving an estate.

Judgment.
Rose, J.

In this case there was no personal contract between the husband and the undertaker, as far as appears, and the sole question for determination is whether a friend who undertook the responsibility of seeing that the wife was properly buried is to bear the costs out of his own pocket or whether they should come out of her estate.

A reference to the cases above cited, I think, will shew that I may properly order the payment out of the estate. The costs of all parties to this application may also be paid out of the estate.

G. F. H.

FAYNE V. LANGLEY
AND
LAVENDER V. LANGLEY.

Company—Assignment for the Benefit of Creditors—President and Vice-President—Wages—Priority.

Claims for arrears of salary, made by persons occupying the position of president and vice-president of a company, such salary being made payable under resolutions duly passed therefor, are valid; and upon the liquidation of the company are payable in priority to the claims of the general body of creditors.

Statement. THESE were actions tried before BOYD, C., at the non-jury sittings at Toronto, on the 23rd October, 1899.

They were brought against the defendant as the assignee for the creditors of the Comet Cycle Company, to recover certain amounts alleged to be due the plaintiffs for salary under contracts made between them and the company, the plaintiff also claiming that under the terms of the statute they were entitled to be paid in priority to the general body of creditors.

The facts, so far as material, are set out in the judgment.

Shepley, Q.C., and F. C. Cooke, for the plaintiffs.

W. H. Blake, for the defendant.

October 28, 1899. BOYD, C.:—

One of the company's by-laws of 10th January, 1898, provides that the board of three directors shall fix the salary or wages to be paid officers of the company.

On the 1st February, 1898, it was resolved by the directors that the president and vice-president be retained at a salary of \$225 per month, and the engagement to date back from 1st October, 1897, and to continue till further notice. And on February 11th, 1899, the directors resolved that the remuneration of the president and vice-president be continued at \$225 per month as heretofore until further notice.

On 28th April, 1899, the action of the directors in the premises was confirmed by a meeting of shareholders, and on the same day it is said the company made an assignment for the benefit of creditors.

Judgment.
Boyd, C.

No imputation of unfair dealing is made, but the matter comes up rather as a question of law whether the claims of the president and vice-president for arrears of salary under the resolution fall within the privilege of the statute R. S. O. ch. 156, sec. 2, whereby they are paid in priority to creditors out of the assets.

The resolution is expressed to be for the remuneration of the president and vice-president at the rate of \$225 a month. It is not to be paid to them as president or vice-president or limited to such services as may be rendered by them in that capacity, but it may mean that. However, it is sufficient to form a contract when acted on to pay the amount which would bind the company in case of direct action to recover payment. *Swabey v. Port Darwin Gold Mining Co.* (1889), 1 Megone's Co.'s Acts Rep. 385, and *Orton v. Cleveland Fire Brick and Pottery Co.* (1865), 3 H. & C. 868; which is still of authority notwithstanding the remark of Wright, J., in *Re Peruvian Guano Co. Ex p. Kemp*, [1894] 3 Ch. 690, at p. 701.

The arrears are due to them not because they are respectively president and vice-president, but because being president and vice-president there was a distinct engagement to pay them the salary for such services as they were to render.

The result is that the plaintiffs are related to the company in two capacities, first, as president and vice-president, and second, as officers in the receipt of salaries. In this latter regard they are in the employment of the corporation within the scope of the statute giving priority: See the cases cited of the *New British Iron Co. Ex p. Beckwith*, [1898] 1 Ch. 324; and *Regina v. Stuart*, [1894] 1 Q. B. 310. The same point is marked in *Re A 1 Biscuit Co.*, W. N. 1899, p. 115, where Wright, J., distinguished between the case of a director in the receipt of a gratuity

Judgment. from the company from whom remuneration depended
Boyd, C. not on membership but upon a contract manifested in the terms of the articles as to remuneration.

It may be open to grave abuse to allow such power as this to be exercised by what was called "one man companies" where the board of directors may practically be masters and servants at the same time, and where there may be the temptation to control and hold various employments at profitable wages under the company. Yet this would appear to invite legislative rather than judicial action, having regard to the general terms of the Act respecting wages.

This is not a case for costs against the general body of creditors represented by the assignee.

G. F. H.

[DIVISIONAL COURT.]

FAWKES ET AL. V. SWAYZIE.

County Court Appeal—Setting down—Time—Computation—"Judgment, Order, or Decision"—Settlement—Power of Judge to Resettle.

The County Courts Act, R. S. O. ch. 55, by sec. 57 provides that "the appeal shall be set down for argument at the first sittings of a Divisional Court of the High Court of Justice which commences after the expiration of one month from the judgment, order, or decision complained of:—"

Held, that the month begins to run from the date of the judicial opinion or decision, oral or written, pronounced or delivered, and the judgment or order founded upon it must be referred to that date.

If such opinion or decision is not pronounced or delivered in open Court, it cannot be said to be pronounced or delivered until the parties are notified of it.

Quære, whether, after a judgment has been settled and entered, the Judge has power to resettle it.

Statement. MOTION by the defendant to quash or strike out the plaintiffs' appeal from an order or judgment of the County Court of York in term, upon the ground that it was too late.

Judgment was reserved upon the argument in term, Statement. and on the 27th July, 1899, the Judge delivered his opinion or decision thereupon, in writing, to the clerk of the Court, who notified the parties of it on the same day.

The minutes of the order or judgment were settled on the 20th September, 1899, and thereupon the order or judgment was entered and issued.

Afterwards the plaintiffs made a motion to vary the order or judgment, and the Judge on the 2nd October, 1899, varied it and changed the date. The order or judgment as varied was then entered and issued as of the 2nd October, 1899, just as if it had been a new judgment.

The plaintiffs, about the middle of October, 1899, gave notice of an appeal from the judgment or order of the 2nd October, 1899, to a Divisional Court of the High Court of Justice at the November sittings, and such appeal was then set down for hearing at such sittings.

The motion to quash or strike out the appeal was heard by a Divisional Court composed of ARMOUR, C.J., and FALCONBRIDGE, J., on the 6th November, 1899.

Shepley, Q.C., for the defendants, contended that the judgment or order was pronounced on the 27th July, 1899, and should be dated on that day: Rule 629*: that the time for appealing allowed by sec. 57 of the County Courts Act, R. S. O. ch. 55, had long expired; that there was no power to hear the appeal or extend the time: *McCarron v. Metropolitan Life Ins. Co.* (1899), 19 C. L. T. Occ. N. 230; *Smith v. Hay* (1899), *ib.* 231; and the Judge had no power to change the date of his judgment.

Wallace Nesbitt, Q.C., for the plaintiffs, contended that the judgment was not pronounced until the 2nd October,

*629. Every judgment and order pronounced by the Court or a Judge shall be dated as of the day on which such judgment or order is pronounced, and shall take effect from that date, unless otherwise directed; and every judgment shall also bear upon its face the date upon which it is signed.

Argument. 1899, citing *Ainsworth v. Wilding*, [1896] 1 Ch. 673; *McMaster v. Radford* (1894), 16 P. R. 20; *Re Swire* (1885), 30 Ch. D. 239; *Trucker v. New Brunswick Trading Co. of London* (1890), 44 Ch. D. 249; and also contended that Rule 629*, by the words "unless otherwise directed," gave the Judge power to change the date of his order or judgment.

Shepley, in reply, pointed out that the words "unless otherwise directed" in Rule 629* referred, not to the date of the judgment, but to the time at which it should take effect, and that the Rule in force in England gives power to change the date. He cited *Kelly v. Wade* (1890), 14 P. R. 13, 66; *Beckett v. Grand Trunk R. W. Co.* (1888), 12 P. R. 377.

December 27, 1899. The judgment of the Court was delivered by

ARMOUR, C.J.:—

The County Courts Act, R. S. O. ch. 55, by sec. 57 provides that "the appeal shall be set down for argument at the first sittings of a Divisional Court of the High Court of Justice which commences after the expiration of one month from the judgment, order or decision complained of;" and the question raised in this case is, from what time the said month commences to run.

"Decision" I take to mean the judicial opinion, oral or written, pronounced or delivered, upon which the judgment or order is founded, and the "judgment or order" is the embodiment in legal procedure of the result of such decision.

The distinction between a judgment and order is pointed out in *Ex p. Chinery* (1884), 12 Q. B. D. 342; and in *Onslow v. Commissioners of Inland Revenue* (1890), 25 Q. B. D. 465; The Judicature Act, R. S. O. ch. 51, sec. 2, sub-sec. 10; Con. Rule 6 (e).

Every judgment and order pronounced or delivered by

the Court or a Judge should bear date of the day when Judgment such judgment or order is pronounced or delivered: Con. Armour, C.J. Rule 629.

By the Imperial Act 12 & 13 Vict. ch. 106, the Bankrupt Law Consolidation Act, sec. 12, an appeal was given, but it was "provided always that if no such appeal shall be entered within twenty-one days from the date of any decision or order of the Court and be thereafter duly prosecuted, every such decision or order shall be final."

And by the Imperial Act 12 & 13 Vict. ch. 108, an Act to amend the Joint Stock Companies Winding-up Act, 1848, sec. 33, it was provided that, "no notice of motion for a rehearing before the Lord Chancellor of Great Britain or Ireland respectively of any order of the Master of the Rolls in England or Ireland, or of any of the Vice-Chancellors in England, under the said Act or this Act, shall be given after the expiration of three weeks after the order complained of shall have been made."

In *Ex p. Hookey* (1862), 4 DeG. F. & J. 456, the order under appeal was made under the latter Act, and was pronounced on the 21st December, on which day it was dated. It was not, however, drawn up until some days after, and more than three weeks had elapsed from the former of these dates before notice of the appeal was served. The Lord Chancellor, Lord Westbury, held that it was too late, and gave a considered judgment on the point, in which he said, among other things, that "the principle which makes the order, whenever drawn up and entered, to bear date on the day when it is pronounced by the Court, I hold to be one in perfect conformity with the whole theory of judicial procedure. The theory of judicial procedure is that the cogent and binding effect of the order begins immediately from the time when the order is pronounced by the lips of the Judge, and if that could be done physically which legally is supposed to be done, and which one would desire to be done if it were possible, every order would be completed on the spot, written out by the judicial officer and *in curia* before the

Judgment. Court rises, and delivered to the parties. That is the unquestionable theory of judicial procedure, and in conformity with that theory that is the time when the order is 'made,' for the two words must be considered as equivalent and capable of being substituted the one for the other. The mere defining of the words of the Court by writing and reducing them into a form in which they can be evidence is a ministerial operation which, according to the true theory, succeeds the delivery of the order by the Judge, and must be in point of fact nothing in the world more than the physical embodiment on the spot by the Court of the words which the Judge has used."

In *Ex p. Dudley and West Bromwich Banking Co.* (1863), 3 DeG. J. & S. 456, the order was made under the former Act and was pronounced on the 18th February, 1863, and it was so dated on the file of proceedings. It was not, however, drawn up till the 26th February, and the appeal was not entered till the 17th March, 1863, and the Lord Chancellor said, "that the date of the order must be taken to be the 18th of February, 1863, and that the appeal was too late."

By Rule 143 of the Bankruptcy Rules, 1870, "an appeal against a decision or order of the Chief Judge in Bankruptcy, or a Judge of a County Court, shall be entered with the Registrar of Appeals within and not later than twenty-one days from the said decision or order, by leaving with him a copy of the appeal notice of motion."

In *Ex p. Hinton* (1875), L. R. 19 Eq. 266, it was held that under this Rule the notice of appeal must be given within twenty-one days from the day on which the order appealed from was pronounced, not from the day on which it was drawn up.

Under the same Rule, *Ex p. Whitton* (1880), 13 Ch. D. 881, was decided to the same effect; these last two decisions following the decisions in *Ex p. Hookey* and *Ex p. Dudley and West Bromwich Banking Co.*

I am of opinion that the principle of these decisions is entirely applicable to the case in judgment, and that the

month mentioned in sec. 57 of the County Courts Act ^{Judgment} commences to run from the date of the judicial opinion or ^{Armour, C.J.} decision, oral or written, pronounced or delivered, and that the judgment or order founded upon it must be referred to that date.

If the judicial opinion or decision, oral or written, is not pronounced or delivered in open Court, then it cannot be said to be pronounced or delivered until the parties are notified of it.

In *Coleman v. Lancashire Insurance Co.*, the trial took place before Patterson, J. A., at Sandwich, who reserved judgment and afterwards delivered a written judgment by sending it to the local Registrar at Sandwich, who omitted to notify the parties of it, and this Court held that the judgment in such case could not be held to have been delivered until the parties had notice of it.*

And this was the reason of the decision in *Robertson v. Wigle* (1888), 15 S. C. R. 214.

In the case in judgment, however, it appears that the judicial opinion or decision of the learned Judge of the County Court was delivered in writing to the Clerk of the County Court on the 27th July, 1899, and that the parties were notified of it the same day.

It appears that the learned Judge of the County Court settled the minutes of the judgment on the 30th September, 1899, and the judgment so settled was duly entered and perfected, and it is questionable whether under the circumstances the learned Judge could resettle it: *Ex p. Brown* (1888), 20 Q. B. D. 693.

In my opinion, the appeal in this cause is too late, and must be struck out with costs.

E. B. B.

* Not reported; decided 13th February, 1886.

RE BURNETT AND TOWN OF DURHAM.

Arbitration and Award—Motion to Set Aside Award—Time—Publication—R. S. O. ch. 223, sec. 465—Arbitrator—Omission to Take Oath—R. S. O. ch. 223, sec. 458—Municipal Corporations—Lowering Grade of Highway—Retaining Wall—Maintenance of—Power to Award—Injury to Land—Interference with Access—Compensation.

The six weeks allowed by sec. 465 of the Municipal Act, R. S. O. ch. 223, for an application to set aside an award, run from the publication to the parties of the award.

The failure of the arbitrator to take the oath required by sec. 458 of the same Act is fatal to his award; but when an award is moved against on the ground of such failure, it must be clearly shewn that the applicant was not aware of the omission until after the making of the award.

An arbitrator to whom is referred a claim for compensation for injury to land by reason of the lowering of the grade of the adjoining highway by the municipality, has no power to direct the municipal corporation to maintain a retaining wall.

The arbitrator has power to include in his award compensation to the land-owner for injury to his land during the progress of the work by interference with the means of access thereto, and also the cost of work done to afford him such access.

Statement. MOTION by the municipal corporation of the town of Durham by way of appeal from or to set aside an award made under the provisions of the Municipal Act by the junior Judge of the County Court of Grey, to whom as sole arbitrator was referred the claim of the respondent for compensation for the damages alleged to have been sustained by him owing to his lands having been injuriously affected by the lowering of the grade of the highway opposite to them by the municipality in the exercise of its powers under the Act. The facts are stated in the judgment.

The motion was heard by MEREDITH, C.J., in Court, on the 3rd October, 1899.

Rowell, for the municipal corporation.

W. H. Blake, for the respondent, opposed the motion on the merits, and also objected that no appeal lay and that the motion, if viewed as one to set aside the award, was too late.

December 16, 1899. MEREDITH, C.J. :—

Judgment,

Meredith,
C.J.

The only objections raised to the award to which it is necessary to refer are the following :

(1) That the arbitrator did not, before proceeding to try the matter of the arbitration, take the oath required to be taken by him by sec. 458 of the Municipal Act, R. S. O. ch. 223.

(2) That the arbitrator had no power to direct as he did that the corporation should "at all times keep up and maintain along the front of the said lands a retaining wall at least equally efficient for the purposes for which same is required to the present retaining wall erected by the corporation."

(3) That the arbitrator erred in awarding compensation for the inconvenience sustained by the respondent during the progress of the work and for the cost of making a roadway to his lands.

Mr. Blake took the preliminary objection to the motion being heard that it was made too late, but his objection is not, I think, well founded.

Treating it as a motion to set aside the award, as it must be treated, because there is no provision in the submission giving the right to appeal, and in such cases no appeal lies (R. S. O. ch. 62, sec. 14), it was in time. The six weeks allowed for such an application by sec. 465* of the Municipal Act, R. S. O. ch. 223, run from the publication to the parties of the award, which was not earlier than 7th June, 1899, and the notice of motion having been served before the expiration of six weeks (excluding vacation) from that day (it was served on the 19th September, 1899), was in time: *Redick v. Skelton* (1889), 18 O. R. 100; *Huyck v. Wilson* (1898), 18 P. R. 44; *Re Potter and Central Counties R. W. Co.* (1894), 16 P. R. 16; *Re Shaw and City of St. Thomas* (1899), 18 P. R. 454, and cases

*465. * * and all applications (otherwise than by way of appeal) to set aside such award shall be made within six weeks (excluding vacations) after the publication of the award * * .

Judgment.
Meredith,
C.J.

referred to, particularly *Re Gallop and Central Queensland Meat Export Co.* (1890), 25 Q. B. D. 230, which is an express decision on the latter point.

But for the authorities, I should have long hesitated before holding that the failure of the arbitrator to take the oath was fatal to the award, as it seems to me that no injustice would be done by treating the provisions of sec. 458* as directory, and that a party would have nothing to complain of, if, having permitted the arbitrator to proceed without seeing that he had taken the prescribed oath, he was precluded from objecting to the award because of his omission to do so.

I do not, however, think that it is open to me to so hold. The making of the declaration, which, under the corresponding provision of the English Land Clauses Act, the arbitrator is required to make, is treated by the text writers and in several decided cases as a condition precedent to the making of a valid award: Cripps's Law of Compensation, 3rd ed., pp. 185, 186; Redman's Law of Awards, 3rd ed., p. 135; Russell on Awards, 7th ed., p. 176; *Re Bradshaw Arbitration* (1848), 12 Q. B. 562; *Re Davies and South Staffordshire R. W. Co.* (1851), 2 L. M. & P. 599; *Levick v. Epsom, etc., R. W. Co.* (1859), 1 L. T. N. S. 60; and *Palmer v. Metropolitan R. W. Co.* (1862), 31 L. J. Q. B. 259.

Levick v. Epsom, etc., R. W. Co. shews that in order to the success of an application to set aside an award on this ground, it must appear clearly in the material in support of it that the applicant was not aware of the omission of the arbitrator to make the declaration until after the making of the award. That being shewn in this case, there is nothing to prevent the objection being taken, and I must give effect to it.

*458. Every arbitrator, before proceeding to try the matter of the arbitration, shall take and subscribe the following oath * * :

"I (A. B.) do swear (or affirm) that I will well and truly try the matters referred to me by the parties, and a true and impartial award make in the premises, according to the evidence and my skill and knowledge. So help me God."

The second objection must also prevail. The arbitrator had no power to make the direction complained of ; his duty was to assess the damages, and though his direction is probably more advantageous to the municipality than would have been an addition to the damages to compensate the respondent for the burden of maintaining the retaining wall, it is the right of the municipality to put forward this objection, and being raised I must give effect to it.

Judgment.
Meredith,
C.J.

The third objection is not entitled to prevail. The substance of what the arbitrator has done is not what the appellants have chosen to call it. He has not, as I understand his memorandum, made any allowance to the respondent for merely personal inconvenience while the works were in progress, but has allowed for the injury to the land during that period. It was, no doubt, according to the finding of the arbitrator, an injury to the land, apart from the purpose for which it was being used, that the means of access to it were interfered with, and that interference, I think, necessarily lessened the rental value of the land, and that I take to be damage within the rule as stated in *Ford v. Metropolitan, etc., R. W. Co.* (1886), 17 Q. B. D. 12.

The other allowance complained of is even less open to objection. It became necessary, owing to what the municipality did to the highway, for the respondent to make an approach to it on his land, to enable him to get from his land to the highway. The land was damaged thereby, and to require the municipality to compensate the land-owner to the extent of the actual cost of the work which had to be done to give him this access was certainly not unjust, and cannot be complained of as too liberal to the respondent.

Had there not been the provision as to the maintenance of the retaining wall, I should have applied the rule designed to prevent appeals where trifling sums are involved referred to by the Chancellor in *In re McRae and Ontario and Quebec R. W. Co.* (1887), 12 P. R. at p. 329, as a salutary rule, and have dismissed the motion, but I have

Judgment. come, with some hesitation I confess, to the conclusion
Meredith, that, having regard to that provision, I ought not to do so,
C. J. and I therefore give effect to the first and second objections, and set aside the award, without costs.

If it had not been for the omission by the arbitrator to take the prescribed oath, I should, under the powers conferred by sec. 464, have remitted the matter to the consideration and determination of the same arbitrator, but it would be no saving of expense to have taken that course, as it would appear that the inquiry must in that case have been begun *de novo* after the oath had been taken, and it may be doubtful whether, if the arbitrator were to take the oath and begin the proceedings *de novo*, the initial error might not invalidate a new award.

E. B. R.

[DIVISIONAL COURT.]

REGINA V. IRELAND.

Intoxicating Liquors—Unlicensed Premises—Search for Liquor—Right of Inspector to take Stranger with Him—Necessity for Warrant—Proof of Liquor being Sold—Liquor License Act, R. S. O. ch. 245, secs. 130, 131.

The right of entry under section 130 of the License Act, R. S. O. ch. 245, into any inn, tavern, etc., to make search for liquor, is limited to the persons named therein, namely, "any officer, police constable or inspector;" and it is only under section 131, on the procuring of a warrant, as therein provided, that the officer, can take with him a person not being one of those so named.

Where therefore a license inspector, in proceeding to search the defendant's premises for liquor took with him a person, other than one of those so named, without having procured a warrant, his act was illegal, and the defendant was justified in resisting it; and a conviction for obstructing the inspector in the discharge of his duty was quashed.

The defendant's premises had been licensed as a tavern, but the license had expired, and the only evidence of liquor being sold, or reputed to be sold therein, was the statement of the inspector, that the defendant's bar-room remained the same as before, i.e., before the expiry of his license.

Per MEREDITH, C.J.—This was not sufficient to satisfy the requirements of the section.

Per MEREDITH, C.J., also.—Under the circumstances of this case an objection that reasonable grounds had not been shewn for suspecting that some violation of the Act was taking place or was about to take place was not tenable.

THIS was a motion by the defendant to quash a conviction made on the 5th January last by George James Grace and R. Walter Brooks, Esquires, two of Her Majesty's justices of the peace for the county of Brant, whereby the defendant was convicted of having on the 21st December previous at the township of Brantford in the premises of the defendant, "being a place wherein refreshments or liquor is reputed to be sold unlawfully did obstruct Isaac B. Merritt, inspector of licenses for the District of South Brant, an officer making searches in the said premises and in the premises connected with such place contrary to the statute in that behalf." Statement.

The facts and the grounds upon which the motion was made appear in the judgments.

Argument.

On October 10th, 1899, before a Divisional Court composed of MEREDITH, C. J., ROSE and MACMAHON, JJ., *Haverson* supported the motion. There should have been evidence shewing that liquor was reputed to be sold on the premises, and it should have been proved that the inspector had reasonable grounds for suspecting that a breach of the Act was taking place, or was about to take place. This is clearly what is contemplated by section 130. It was so decided under a similar section in the English Act: *Duncan v. Dowding*, [1897] 1 Q. B. 575. That was a case for the contravention of section 16 of the English Licensing Act of 1874, and it was held that to entitle the officer to a right of entry he must shew he had reasonable grounds for suspecting that a breach of the Act was being perpetrated. In any event the inspector was a trespasser in taking Campbell with him. Section 130 limits the right of search to the persons specially designated in the Act, namely, "Any officer, police constable, or inspector." If it is desired to have anyone beside those named, then the provisions of section 131 must be complied with, namely, an information must be laid and a warrant taken out. Here no information was laid or warrant issued. Upon this ground, therefore, the conviction cannot stand.

Langton, Q.C., for the Crown. The inspector was properly exercising his duty as inspector in making search for liquor; and he had reasonable grounds for suspecting that liquor was being sold on the premises, for he knew that the premises were being kept in the same condition that they were before the defendant's license expired, the bar being kept there just as before; and the inspector so states in his evidence. He therefore clearly had the right to make the search. He also had the right to have assistance. The evidence does not shew in any way that the inspector insisted on having Campbell there; at all events, after his presence was objected to, Campbell took no part in the search. The objection was to the inspector making the search at all. Under these circumstances,

the defendant was properly convicted, for he obstructed the license inspector in the discharge of his duty : *Regina v. Sloan* (1891), 18 A. R. 482. Argument.

December 5th, 1899. MEREDITH, C.J. :—

The offence of which the defendant has been convicted is created by sub-sec. 2 of sec. 130 of the Liquor License Act (R. S. O. ch. 245).

The first sub-section of section 130 is in these words :

“ 130. (1) Any officer, policeman, constable, or inspector may, for the purpose of preventing or detecting the violation of any of the provisions of this Act which it is his duty to enforce, at any time enter into any and every part of any inn, tavern, or other house or place of public entertainment, shop, warehouse or other place wherein refreshments or liquors are sold, or reputed to be sold, whether under license or not, and may make searches in every part thereof, and of the premises connected therewith, as he may think necessary for the purpose aforesaid.”

The first question raised by the defendant is as to the right of the inspector to enter upon the defendant's premises and to make there such searches as are authorized by section 130 to be made.

Section 130, unlike the corresponding provision of the English Licensing Act of 1874, 37 & 38 Vict. ch. 49, sec. 16, is not confined to licensed premises, but the right of entry and search extends also to unlicensed premises “ wherein refreshments or liquors are reputed to be sold.”

The defendant's premises had been licensed as a tavern, but the license had expired before the entry and search by the inspector which are in question.

No evidence was given before the justices that on the defendant's premises refreshments or liquor were reputed to be sold. The inspector was examined as a witness, but made no such statement. The only evidence given pointing in that direction is the statement near the beginning of the inspector's depositions, that the defendant's bar-

Judgment.
Meredith,
C.J.

room remained the same as before, i.e., before the expiry of his license. That, it appears to me, falls far short of a statement that refreshments or liquors were reputed to be sold on the defendant's premises. The existence of such a reputation was in my opinion necessary to justify the inspector in making the entry into and search of the defendant's premises and that essential fact not having been proved, the defendant ought not in my judgment to have been convicted.

It was argued by Mr. Haverson that in order to justify an entry and search under section 130 it is necessary to shew also that the officer had reasonable grounds for suspecting that some violation of the Act was taking place or was about to take place on the premises, and that inasmuch as, as he contended, that was not shewn in this case the entry and search in question were not shewn to be a lawful exercise by the inspector of the powers conferred by the section. In support of this contention, *Duncan v. Dowding*, [1897] 1 Q. B. 575, was cited. That was the case of a prosecution for a contravention of section 16 of the Licensing Act of 1874, in refusing or failing to admit a constable to a room in the licensed premises of the respondent, and it was decided by a Divisional Court that before the occasion for the exercise of the power of entry could arise the constable must have reasonable ground for suspecting that circumstances existed or were about to exist constituting a violation of some of the provisions of the Licensing Acts. That decision it is said is conclusive against the conviction in this case.

In the case of *Regina v. Sloan* (1891), 18 A. R. 482, section 130 was under consideration by the Court of Appeal. In that case the prosecution was against a licensed tavern keeper for failing to admit the inspector in the exercise of his business or duty when demanding admission to one of the apartments of the premises of the defendant.

It was objected by the defendant that no offence had been committed, as the inspector had not specified for what purpose he wanted to enter the room in the execution of

his duty. The defendant was convicted, but on appeal to the sessions effect was given to his objection and the conviction was quashed.

Judgment.
Meredith,
C.J.

The Attorney-General then appealed against the order of sessions to the Court of Appeal, and it was decided by that Court that as it was proved that the inspector formally demanded admittance to the room in question "as license inspector in the execution of his duty," the defendant's objection was untenable and the appeal was therefore allowed and the conviction upheld.

The language of sub-sec. (1) of sec. 130, is said by the Chief Justice (Hagarty) to be identical with that of sec. 16 of the English Licensing Act of 1874. On a comparison of the two provisions, it will, however, be observed that they are not quite identical, the words "and may make searches in every part thereof and of the premises connected therewith as he may think necessary for the purpose aforesaid" which appear at the end of sub-section (1) are not to be found in section 16 of the English Act, and there are other verbal differences which it is not necessary to notice.

It is probable that the learned Chief Justice intended no more than that the two provisions meant substantially the same thing.

The objection taken in *Duncan v. Dowding* was not urged against the conviction; and though there are some general observations to be found in the judgments which would seem to indicate that such a demand as was made, being made and being followed by a refusal or failure to admit the officer, the offence under the statute was complete, it is to be borne in mind that the question now raised was not brought to the attention of the Court, and *Regina v. Sloan* cannot therefore be taken to have decided anything contrary to what was decided in *Duncan v. Dowding*.

In *Regina v. Dobbins* (1883), 48 J. P. Cas. 182, a prosecution under section 16, the constable who was refused admittance sought to enter the house of the defendant in order to prevent or detect the violation of the provisions of

Judgment. the Licensing Acts. He was visiting all the licensed houses
Meredith, that day in the exercise of what he considered his duty;
C.J. and it was held that the fact that he did not suspect the
commission of an actual offence did not deprive him of the
justification under the Act.

This case was cited by counsel in *Duncan v. Dowding*; but is not referred to in the judgments in that case. It must be taken, therefore, I think, that nothing was intended to be decided which conflicted with the decision in the earlier case, and the reason for the result of the later one may possibly be the fact that it appeared affirmatively that the constable had not reasonable ground for suspecting that circumstances existed or were about to exist constituting any violation of the provisions of the Act.

In this state of the authorities, on the facts of this case, we ought not, I think, to hold, considering the case apart from a further objection urged against the conviction to which I shall afterwards refer, and assuming that the defendant's premises were a place where refreshments or liquor were reputed to be sold, within the meaning of the Act, that the inspector was not justified in entering them. It is true that the inspector does not say in terms that he suspected a violation or intended violation of the Act, but he does not say the contrary, and his evidence as to the bar-room, to which I have referred, may have led the justices to the conclusion that reasonable grounds for suspicion, if that be necessary to be shewn, existed. At all events there is nothing in the case inconsistent with that view; and I am of opinion, therefore, that the defendant's second objection fails.

The third objection raised by the defendant is based upon the proposition that section 130 authorizes only persons of the description named in it, viz., an officer, policeman, constable or inspector, whose duty it is to enforce the provisions of the Act, to enter and search, and that such a person may not take with him in making his domiciliary visit any one not coming within that description, and that if he does so, a person refusing to admit them to the

premises or where they have gained admittance to permit them to search there does not commit an offence against sub-section 2.

Judgment.
Meredith,
C.J.

That proposition is, I think, well founded. The authority conferred is entrusted only to certain named descriptions of persons, and I can find in the section no warrant for the contention made by Mr. Langton that any one of such persons may take with him for the purpose of his entry or search any one not belonging to one or other of these descriptions of persons, unless such an authority is found either in express terms or by necessary implication in the language which the Legislature has used, and I think it is not in that of section 130. Such a person would, it appears to me, be a mere intruder and a trespasser; and I think it follows that an authorized person insisting on his right to enter or to search accompanied by such a person would be a trespasser also and not entitled to rely on section 130 for a justification of his acts.

It is beyond question on the evidence sent up, that the inspector on the occasion of his visit to the premises was accompanied by a man named Campbell who was not one of any of the classes of persons mentioned in section 130: that the inspector took Campbell with him because he did not wish to make his search alone, and for the purpose of taking away the liquor if he found any: that the defendant objected to the presence of Campbell on his premises: that the inspector insisted on his remaining there for the purposes for which he had brought him; and that the defendant refused to permit the inspector to continue his search, for which the complaint under investigation was made, was after all this had taken place. It is true that the defendant, according to some of the evidence, made no objection to the entry of the inspector or to the searches he made down to the time that search of some room in the house was desired to be made—probably the bar-room; but this is, I think, explained, if explanation be necessary, by the fact that the defendant does not appear to have been aware of the presence of Campbell until the time at

Judgment. which his objection to his being on the premises was made.
Meredith, Assuming that the defendant did know of Campbell's
C.J. presence sooner, that at most, as appears to me, would amount to a license to the inspector to enter, and it was in my opinion within the strict right of the defendant to revoke that license at will, and when the revocation was brought to the notice of the inspector and objection was made to Campbell continuing on the premises, and the right of Campbell to remain was insisted on, the inspector and Campbell became from that moment trespassers, and the inspector was no longer entitled to rely on the provisions of section 130 as a justification for his subsequent acts.

It is quite true that the defendant, according to some of the evidence, objected that the inspector had no right to search any other part of the house than the bar-room, without a search warrant; it may be that he knew that without such a warrant the inspector had no right to bring Campbell on the premises to take part in the proceedings, but whatever he may have thought it is beyond question that the defendant at some stage brought to the notice of the inspector and Campbell his objection to the presence of Campbell, and to search being continued while he remained, and that the refusal which forms the ground of the charge against him took place after that, and that being so, the defendant's refusal did not, in my opinion, constitute an offence within sub-section 2.

The conviction should, in my opinion, be quashed with costs to be paid by the inspector.

Rose, J. :—

I am of the opinion that on the facts of this case the inspector had no right to have with him the man Campbell to assist in searching the house without a warrant.

Arriving at that conclusion, I do not find it necessary to consider the question raised by the learned Chief Justice as to whether there was evidence that refreshments or liquors were reputed to be sold on the premises or

whether it was necessary that there should be such evidence. That question was not raised on the motion before us.

Judgment.
Rose, J.

I think the conviction must be quashed with costs.

MACMAHON, J.:—

The right of search given by sec. 130 of the Liquor License Act (R. S. O. ch. 245), for preventing or detecting a violation of the Act, is restricted to an officer, policeman, constable or inspector. And it is only where such officer, policeman, etc., has on information obtained a warrant under section 131 that he can bring with him an assistant or assistants to search for liquor in any unlicensed house, etc.

Not having a warrant, Merritt, the inspector, had no right to bring Campbell with him to assist in searching the defendant's premises, and Campbell was from the moment of his entering a trespasser on Ireland's property.

Ireland had a hotel license for his premises until May last. During the search by the inspector of the hen house and ice house, Campbell did not enter either place, but when the inspector entered Ireland's house and made a search in what had formerly been the bar-room, Campbell, according to his own evidence, was standing in front of the bar while the inspector was searching behind it. While this search was going on, Ireland requested Campbell to leave the house, which he, after speaking to the inspector, refused to do, and went from the bar into one of the front rooms. No liquor being found in the bar-room, the inspector, after concluding his search there, informed Ireland that he intended searching the bed-rooms upstairs. Ireland refused to permit a search being made while Campbell was there, unless the inspector had a warrant, and it is upon this refusal to permit a search that the conviction of the defendant is based.

The inspector said in his evidence that he did not want to make the search alone, and, having brought assistance

Judgment. with him into the defendant's house, the defendant had at any time a right to demand if he was clothed with the authority of a warrant, and if not he was justified in refusing to permit further search being made.

**MacMahon,
J.**

The authority given to an inspector or other officer by the Act must be strictly pursued : *Duncan v. Dowding*, [1897] 1 Q. B. 575.

The conviction must be quashed with costs.

G. F. H.

[DIVISIONAL COURT.]

REGINA V. THE T. EATON CO., LIMITED.

Trade Mark—Trade Description—False Application of—"Quadruple Plate"—Evidence.

The defendants by an advertisement in a newspaper described certain tea-sets as "quadruple plate," stating that the regular price thereof was "\$12.00 a set, Saturday at \$6.00." The purchaser of one of the sets, before making his purchase, inquired, and was informed, by the saleswoman of the defendant, that it was one of the tea-sets advertised, and that the advertisement could be relied upon :—

Held, ROSE, J., dissenting on this point, (1) that the use of the words "quadruple plate" in the advertisement was an application of false trade description, in that the goods could not properly be described as such ; (2) that there was evidence to shew that the advertisement applied to these goods.

Statement. THE defendants were convicted at the General Sessions of the Peace for the county of York, on the 14th of December, 1898, of having on the 10th and 11th of June, A.D. 1898, and on other days and times since the said 10th day of June, and before the finding of the indictment, unlawfully sold and unlawfully exposed for sale and unlawfully having had in their possession for sale, "certain goods, to wit, certain pieces of silverplated ware to which and to each of which a false trade description, to wit, the words or marks 'quadruple plate' had been applied contrary to the Criminal Code, sec. 446."

A special case was reserved by McDougall, Co. J., Statement.
the Judge before whom the trial took place for the
opinion of the Court under sec. 743 of the Criminal Code,
1892.

The evidence and facts set out in the case were that the defendants inserted in the "Toronto Evening News" an advertisement which appeared in the issue of that paper of Friday the 10th of June, 1898. The advertisement after referring to certain goods for sale in the silverware department of the defendants' store at Toronto, contained the following statement :

"In the same section we're going to sell Tea sets, 4 pieces, quadruple plate, handsomely engraved, regular price \$12 a set, Saturday at \$6."

The advertisement was handed to the "News" by the defendants in the forenoon of Friday, June 10th, it being sworn that the defendants had then in their possession a number of tea sets to which the advertisement was intended to apply. On the 11th of June, 1898, a tea set was sold in the ordinary course of business to one John Impey, a witness for the Crown. Impey inquired if the tea set he was purchasing was one of the tea sets advertised as "quadruple plate," and was told by the saleswoman that it was, and that he could rely on the advertisement. Some tea sets similar to the tea set purchased by Impey were ordered by the defendants from the manufacturer after the advertisement was handed to the "News," and the evidence differed as to whether they were ordered on the afternoon of Friday, the 10th, or the forenoon of Saturday, the 11th of June. The manager of the manufacturing company swore that he received the order for tea sets of the same quality as the set sold to Impey on Friday, the 10th, and the manager of the defendants' silverware department swore that he directed the order to be telephoned to the manufacturer at 10 a.m. of the 11th of June. The tea set sold was proved not to be of the quality of the tea sets advertised.

Argument. On May 8th, 1899, the case was argued before a Divisional Court composed of MEREDITH, C.J., ROSE, and MACMAHON, JJ.

Maclaren, Q.C., for the defendants. The advertisement does not constitute the application of a trade description within the section. The use of the words "quadruple plate" is not a trade description within subsecs. 3 and 4 of clause (b). It is not a description of the mode of manufacture or of the composition of the material. It was a mere mode of puffing the goods. The definition of "quadruple plate" and "quality," as given in the standard dictionaries, shews that it cannot have the meaning contended for by the Crown. The next point is that the evidence does not shew it applied to these goods. It is necessary to shew that the trade description is connected with the goods sold. Verbal statements with regard to the matter are not sufficient. To connect the advertisement with the goods there must be something affixed to the goods sold so as to identify them with the representation. In *Budd v. Lucas*, [1891] 1 Q. B. 408, which was a conviction for a false trade description on the sale of beer under a similar section to ours, the invoice accompanied the goods and contained the description on which the conviction was based. It was thus connected with the goods sold. In the case of *Coppen v. Moore* (No. 1), [1898] 2 Q. B. 300, at p. 304, which was a sale of hams, the invoice also accompanied the goods and contained the false description. In the present case there is nothing to connect the advertisement with the goods except the verbal statement of the saleswoman who sold the goods to the purchaser. This is not sufficient. There was no evidence to submit to the jury to shew that the description applied to these particular goods. It is immaterial whether the goods were in the company's possession or not when the advertisement was inserted.

J. R. Cartwright, Q.C., contra. The description contained in the advertisement was clearly applicable to the goods here. It is not necessary that the description should

be physically connected with the goods. It is sufficient **Argument.** that the description should be reasonably and fairly connected with them. In the cases referred to of *Budd v. Lucas*, [1891] 1 Q. B. 408, and *Coppen v. Moore* (No. 1), [1898] 2 Q. B. 300, the invoices were not attached to the goods but merely sent at the same time, and it was necessary in those cases that there should be evidence to connect the invoices with the goods; and so in this case evidence was properly admitted of the saleswoman to shew that these were the goods referred to in the advertisement and that they were so sold in connection with the advertisement. This is sufficient under the statute. Then as to the other point. It is quite clear that the use of the word "quadruple plate" can have no other meaning than that contended for by the Crown. It is not, however, open to the defendants under the case reserved, as the case is based on the fact of "quadruple plate" being a trade description, and that it was false, and there was sufficient to shew that the advertisement applied to these goods.

5th December, 1899. MEREDITH, C.J.:—

[After setting out the facts contained in the case reserved proceeded]:

The questions submitted were the following:

"1. Was the use of the words 'quadruple plate' by the defendant company in the said advertisement so inserted by the said company in the said "Evening News" an application of a false trade description to goods within the meaning of the fourth count of the said indictment, provided that the goods in question were not and could not be properly described as quadruple plate?

"2. Was there evidence to go to the jury on the above statement of facts that the description 'quadruple plate' in the said advertisement might refer to the tea set so sold to the said John Impey?"

Upon the argument we were asked by Mr. Maclaren to consider and determine whether the description "quad-

Judgment. ruple plate" came within the definition contained in sub-
Meredith, sections 3 and 4 of clause (b) of section 443, which define
C.J. "trade description" as meaning any description, statement
or other indication, direct or indirect;

(3) as to the mode of manufacturing or producing any goods,

(4) as to the material of which any goods are composed.

He contended that it did not, and that the term "quadruple plate" was neither, but was merely a description of the quality in the sense in which the words "handsomely engraved" are used in the advertisement of the goods referred to.

I do not think, however, that that question is open to the defendants. All that is submitted, as I understand the case, is (1) whether the advertisement in the newspaper could in law constitute an application of a trade description to the goods within the meaning of the Act; and (2) whether there was evidence to go to the jury that the advertisement in fact applied to the goods.

The case assumes that the term "quadruple plate" was a trade description within the meaning of the Act, and that it was a false one.

It is, moreover, on the evidence which is before us, impossible to say that the term "quadruple plate" is but a statement of quality in the sense in which I have mentioned; and I do not know why the word may not be properly used as descriptive of the material of which a thing is composed, if not of the mode of manufacturing or producing it.

It is said by Mr. Justice Wright in *Coppen v. Moore* (No. 1), [1898], 2 Q. B., 300 at p. 304, that the Act does not apply to a trade description which is wholly verbal.

In *Budd v. Lucas* [1891], 1 Q. B. 408, and *Coppen v. Moore*, (No. 1), descriptions in the invoices accompanying the goods were held to be within the Act, the writing of the description in the invoice being, in the opinion of Mr. Justice Wright, in the latter case, more than a verbal trade description.

Assuming the dictum of Mr. Justice Wright to be a correct statement of the law, as to which it is unnecessary to express an opinion, the description being contained in the advertisement in this case brings it within the principle upon which the two cases referred to were decided. In both of them oral testimony was required in order to connect the invoice with the goods, and I am unable to see why the description contained in the advertisement may not be held to be applied to the goods sold in this case, just as the invoices in those cases were. The only difference I can see is that the description in the one case is applied before, and the other at or after the time of sale; but that can, I think, make no difference in the application of the principle.

Judgment.

Meredith,
C.J.

With regard to the second question, the evidence was, I think, sufficient to justify the learned chairman submitting the case to the jury. Indeed, I do not see why, even if the defendants' account of the matter had been accepted, it was not open to the jury to come to the conclusion that the description contained in the advertisement was intended to apply as well to the goods obtained from the manufacturers on the Saturday as to those in the defendants' store on the Friday.

Both questions should, in my opinion, be answered in the affirmative.

ROSE, J. :—

If we are to assume that the words "quadruple plate" constitute a trade description, then I think that on the question put to us, which assumes that the goods were not properly described as "quadruple plate," in other words that they were not "quadruple plate," we should answer the first question in the affirmative, because I am of opinion that what was done here was an application of a trade description to the goods.

Section 446 of the Criminal Code provides, in sub-sec. (d), that "every one is deemed to apply * * a trade

Judgment. description to goods who (*d*) uses a * * trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that * * trade description.”

Rose, J.

The advertising of the goods in question was, in my opinion, assuming the words amount to a trade description, the using of a trade description in a manner calculated to lead to the belief that the goods were described by such trade description.

I am, however, unable to see that upon the case we can assume that the use of the words “quadruple plate” as stated in the question was an application of a trade description; or in other words, that the words “quadruple plate” amount to a trade description, and I think before we can answer that question we must see upon the case that such words were a trade description. There is no statement upon the case that the words were a trade description. There was no finding by the jury of the fact, as far as the case states, and I cannot say that the use of the words “quadruple plate” was an application of a false trade description if I cannot see that such words were a trade description.

I find by section 443 trade description defined. It was not urged that sub-sections 1, 2, 4, or 5 of sub-section (*b*) of that section, apply at all to the case before us; but what was urged was that the words “quadruple plate” was a “description, statement or other indication direct or indirect” “as to the mode of manufacturing or producing any goods.” I do not think I can say as a matter of common knowledge or law that the words “quadruple plate” describe the mode of manufacturing or producing any goods. I do not know. It does not appear whether that question was discussed in the Court below or not, but certainly some evidence was required to satisfy the Court that these words described the mode of manufacturing or producing goods. That fact not being found, or not being stated, I am unable to answer the first question in the affirmative, and would send the case back to be amended

or restated, under the provisions of section 745. On the case, as now stated, I cannot agree to answer the question in the affirmative. Judgment.
Rose, J.

As to the second question, I think there was evidence to go to the jury upon the statement of fact submitted to us that the description "quadruple plate" in the said advertisement might refer to the tea set so sold to the said John Impey, whether the set purchased by him was in the possession of the defendant company at the time of putting in the advertisement or was obtained by the company after the advertisement appeared, as long as the purchaser read the advertisement before the purchase and relied upon it, as there was evidence the purchaser here did.

MACMAHON, J., concurred with the Chief Justice.

G. F. H.

[DIVISIONAL COURT.]

THE GOLDIE AND McCULLOCH COMPANY (LIMITED)

V.

HARPER.

Bills of Exchange—Conditional Sale of Goods—Loss of Goods by Fire—Liability.

The plaintiffs sold and delivered certain machinery to the defendant, receiving part of the price in cash and part in notes, and by the contract of sale it was provided that no property in the machinery should pass to the defendant until it was paid for. The machinery was destroyed by fire before the notes were paid. In an action on one of the notes :—

Held, that the defendant had the possession and use of the machinery and an interest in it ; that there was not a total failure of consideration for the note or a partial failure which was ascertained, and that the plaintiffs were entitled to recover.

Statement. THIS was an appeal from the County Court of the county of York, in an action on a promissory note, given by defendant to the plaintiffs for part of the price of machinery, in which it was contended that as the contract of sale provided that the property therein should not pass to the defendant until the whole amount of the purchase money was paid ; and as the machinery was destroyed by fire before that was done, there was no consideration for the note in the hands of the plaintiffs, and they could not recover on it.

The other facts sufficiently appear in the judgments in the Divisional Court.

The action was tried before His Honour Judge Morgan, junior Judge of the County Court, without a jury, who gave judgment given in favour of the plaintiffs for the amount claimed.

From this judgment the defendant appealed, and the appeal* was argued on December 6th and 7th, 1899, before

* On the opening of the argument, Aylesworth, Q.C., for the appellant, asked for an adjournment until the action by the plaintiffs against the Bank of Hamilton et al. pending in the Court of Appeal, should be disposed

a Divisional Court composed of MEREDITH, C. J., ROSE, Argument.
and MACMAHON, JJ.

Aylesworth, Q. C., for the appeal. No property in the machinery passed by the terms of the contract of sale. The defendant is sued for the purchase money of property which was not hers. She was simply a bailee. The machinery was merely out of the possession of the owners, the plaintiffs, and if they failed to protect themselves by insurance for their own benefit the loss is theirs. There was an entire failure of consideration for the note. The consideration was the machinery, not a mere right to purchase it: *Sawyer v. Pringle* (1891), 18 A. R. 218; *Elphick v. Barnes* (1880), 5 C. P. D. 321; *Howell v. Coupland* (1876), 1 Q. B. D. 258.

Wallace Nesbitt, Q. C., and *H. E. Rose*, contra. The defendant got possession of the machinery and used it. She had an insurable interest, and contracted to insure and assign the policy to the plaintiffs. Such an interest could be seized and sold by a sheriff under an execution: 62 Vict. 2nd sess. ch. 7, sec. 9 (O.). The plaintiffs' right to retake the machinery was lost by the fire, but they should not lose their right to payment too. The plaintiffs are entitled to recover on the principles laid down in *Hesselbacher v. Ballantyne* (1896), 28 O. R. 182; affirmed in appeal (1898), 25 A. R. 36, and cases there referred to; *Tufts v. Griffin* (1890), 107 N. C. 47, and *Burnley v. Tufts* (1888), 66 Miss. 49. In *Sawyer v. Pringle* the vendor had put it out of his own power to do what he contracted to do, viz., to deliver the property on receiving payment.

Aylesworth, in reply. In *Hesselbacher v. Ballantyne* there was an absence of the stipulation that the property should not pass which appears in this case.

of; wherein the right to the insurance money for the machinery for which the note sued on in this action was given was in question, as he contended the result of that action might determine this.—RKP.

Judgment. December 8, 1899. **MEREDITH, C. J.:**—

Meredith,
C. J.

Mr. Aylesworth strongly pressed upon us to postpone the disposition of this case until an appeal pending in an action between the present plaintiffs and the Bank of Hamilton in the Court of Appeal is determined, contending that the issues in this case or some of them were affected by the principles which might ultimately be held properly to govern in that case.

If I thought there was the slightest doubt as to the matters involved in this suit being in any way affected by the result of that decision in the Court of Appeal, I should have felt personally that it was not fitting that this case should have been heard, or, at all events, disposed of until a decision of the case in the Court of Appeal was reached. However, Mr. Aylesworth was unable to point out, and from my own knowledge of the facts I know that it was impossible for him to point out, that any of the considerations which are to govern the case of *Goldie v. Bank of Hamilton* can affect this case.

At the most, if the plaintiffs are entitled to recover in this action, the *Goldie & McCulloch Co.*, who were by virtue of the contract to insure, mortgagees of the property—perhaps that may not be quite technically an accurate description, but it is sufficient for the purpose—and entitled to have the policy of insurance treated as having been effected *pro tanto* for their benefit, and the case of *Edmonds v. The Hamilton Provident and Loan Society* (1891), 18 A. R. 347, shews that in those circumstances the creditor having the policy of insurance is entitled to collect it, and to hold the fund in lieu of the property until all the payments, which have been stipulated to be made have been made.

Then, coming to the questions involved in the case, it seems to me there are several answers to the contention of Mr. Aylesworth, which was that the goods having been parted with by the plaintiffs to the defendant upon the terms of an agreement by which no property in them passed to her, and that the defendant was to be entitled

to the goods only upon the completion of her payments and the further stipulation that in the event of default all payments made should be treated as rent, and the agreement was to be deemed a hire agreement, that there was a total failure of consideration for the notes, the property having been, without the default of the defendant, destroyed, so that, as contended, the plaintiffs were not in a position to give to the defendant that which they had contracted to give.

Judgment,
Meredith,
C.J.

The action is upon the note, and it appears to be clear law that unless there is a total failure of consideration, or unless there is a partial failure as to something which is ascertained and liquidated, the partial failure of consideration is no answer to an action upon the note. That was held by the Court of Appeal in a case of *Barber v. Morton* (1882), 7 A. R., at p. 122.

Now, here it is clear that there was not a total failure of consideration. The defendant got the possession of the property. It was put in her mill, and for some time she operated the mill by means of it. It is impossible to separate the consideration so as to ascertain, as was determined in the *Barber* case, any liquidated sum which should be deducted by reason of the failure of consideration, if there was failure, as to the goods which were destroyed. That would seem to me in itself to be a complete answer to the case made by the defendant.

The case of *Hesselbacher v. Ballantyne* (1896), a decision of my brother Rose, reported in 28 O. R. 182, was relied upon by the plaintiffs. I think there is very great force in the reasoning in that case and of the Courts of the United States in the decisions which are referred to in it, and while it is not necessary to pronounce any definite conclusion as to what the law is upon the particular matter dealt with in that case, I see no reason to doubt the correctness of the conclusion at which my learned brother arrived. If it were proper in the cases to which he refers to look at the whole contract for the purpose of determining what its nature was, it is an *a fortiori* case here, hav-

Judgment. ing regard to the character of the property which was the
Meredith, subject of the contract.
C.J.

Mrs. Harper was the owner of a mill in which there was old fashioned machinery for the purpose of operating it; she was desirous of supplying it with new and better machinery, and her contract with the plaintiffs was that they were to take out the old machinery, using in refitting the mill so much of it as might be proper to use for that purpose, and supplying the rest new, and being entitled to take for their own benefit that which they did not use.

It would be an extraordinary thing, it seems to me, the machinery having been put in and some parts of it having been attached to the freehold, that it would be possible to contend that the case is one governed by the principle which Mr. Aylesworth invoked, and that if the property be destroyed, the vendor of it would not be entitled to recover at all, but must lose the whole of the purchase money.

I think our Legislature has practically adopted the view which the American Courts have taken as to the true position of contracts such as that in question. By R. S. O. ch. 149, the Conditional Sales Act, the vendee or lessee or bailee, or whatever you choose to call him, under such a contract as this, is given an equitable right to the property. Provision is made that the bailor if he takes possession of it for breach of the terms of the agreement shall not sell for twenty days, and the right to redeem at any time before the sale takes place, upon payment of the amount due with the expenses attendant on the sale, is given to the mortgagor.

The substance of the transaction in this case was, I think, a present sale and purchase; and, at all events, the Legislature has said, whatever the form of the transaction is in such a contract as the one in question here, the vendee is not a mere hirer of the property with a right afterwards to become the purchaser, but is the equitable owner of it, subject to payment of the purchase money:

see *Helby v. Mathews*, [1895] A. C. 471; *Lee v. Butler*, Judgment,
[1893] 2 Q. B. 318. Meredith,
C.J.

Then by a statute passed in the last session, 62 Vict., 2nd sess., ch. 7, sec. 9, referred to by Mr. Rose in his argument provision is made permitting the sale under execution of such an interest as this in goods. So that it seems to me that a substantial interest in the goods, the very interest that, according to the real nature of the transaction, the parties intended, that is the right to the property upon payment of the amount due, passed to the purchaser.

It seems to me that upon all these grounds the case of the defendant is plainly not sustainable, and that the judgment appealed from is right, and the appeal must be dismissed with costs.

ROSE, J. :—

I think the case for the plaintiffs was well put in argument yesterday morning when it was stated somewhat as follows: "The action was on a promissory note; the plaintiffs' case was made when they proved the making of the promissory note. The defendant answered: I am not bound to pay that note because it, with other notes, was given as consideration for the price of certain goods delivered to me under a conditional hire receipt or conditional sale contract, the goods having been destroyed before the purchase money was paid."

Then we look at the conditional hire contract, and we find that it provides for the purchaser having possession of the goods, and conditionally upon her paying the purchase money becoming absolute owner of them. All that is left in the vendors is the right to take back the goods as security for the payment of the money. They have to do nothing further. Everything that is to be done is to be done by the purchaser, and that is to pay the purchase money.

The fire destroyed the goods. The right of the vendors to take back the goods is gone. Their additional security

Judgment.

Rose, J.

—additional to the promise of the vendee to pay,—has been taken away from them. The goods have been taken away from the vendee; there remains her promise to pay. Is it any answer to the action to say that the goods have been destroyed? It is an answer if the consideration totally fails. It is no answer if there is a partial failure, unless such failure is as to an ascertained and liquidated sum.

In the present case the total consideration was not simply the agreement that the title in the goods should pass upon payment of the purchase money. It was the making of the contract, the delivery of the goods to the vendee, the right of the vendee to hold possession until default, and to obtain the goods even after default upon payment of the purchase money. That was part of the consideration, at least, and that part has not been wholly taken away from the vendee, and so in an action on the promissory note the defence suggested is not any answer. It is not an answer because it is not a total failure of consideration. It is not an answer as to part because the sum, assuming a partial failure, is not liquidated or ascertained.

I cannot see how the action with reference to the insurance money can in any wise affect this suit. That determines simply that the plaintiffs, the vendors, are to get in part payment certain insurance moneys. It is not suggested and as stated to us it is not the fact that the insurance moneys will pay the whole of the purchase money. There remains a balance which is represented in part by the promissory note. The amount of this judgment if recovered, plus the insurance money, would not equal the amount of the purchase money, and therefore no answer has been suggested arising out of the suit for the insurance moneys which can be an answer in this. It follows that the application to stay these proceedings or to stay the further disposition of this matter until the hearing of the case in appeal, was not founded upon facts which could support it.

As the learned Chief Justice has stated, I formed an opinion as to the character of the interest going to the vendee in the case of *Hesselbacher v. Ballantyne*, and that opinion is strengthened by the legislation to which he referred, and I see no reason for departing from the opinion there expressed.

Judgment.
Rose, J.

I agree to the judgment pronounced.

MACMAHON, J. :—

I agree in the judgment which the learned Chief Justice has pronounced. I think the case is governed by *Hesselbacher v. Ballantyne*.

MEREDITH, C. J. :—

The appeal is therefore dismissed with costs.

G. A. B.

RE FOSTER
AND
THE CORPORATION OF THE CITY OF HAMILTON.

Municipal Corporation—By-law—License—Delegation of Power to Cancel.

A municipal corporation cannot delegate to a board of health power to cancel a license which it may have under 62 Vict., 2nd sess., ch. 26, sec. 37 (2) (O.).

Statement. THIS was a motion to quash a by-law which was argued in the Weekly Court on June 7th, 1899, before ROSE, J.

Lynch-Staunton, for the motion. No applicant for a license can be compelled to sign such an agreement as is set out in the by-law providing that the licensee will permit inspection of his cows and dairy by the city sanitary inspector, and that the board of health may cancel the license on being satisfied that a condition of things exists which justifies such action. The effect might be to take away his license and his livelihood. Selling milk is a common law right, and the only power the municipality has, is to license and regulate and not to forfeit a license: *Merritt v. City of Toronto* (1895), 22 A. R. 205.

Mackelcan, Q. C., for the corporation. The municipality has the right to issue or withhold the license, and if so, they have the right to insist on the agreement before the license is issued. They have the power to license and regulate milk vendors: R. S. O. ch. 223, sec. 583, sub-sec. 23. They may appoint inspectors and provide for inspection: section 550. The local board of health may inspect: R. S. O. ch. 250, sec. 4. They have the power to grant or refuse a license without giving any reason: 62 Vict. 2nd sess. ch. 26, sec. 29 (O.), and may revoke or cancel a license in the same way: section 37 (2). There would be no protection to the public if a milk vendor could not be stopped selling if the circumstances were such that the license would not have been originally

granted if the same state of things had then existed. **Argument.**
(ROSE, J.—Surely he could be punished in some other way than by depriving him of his license.)

Lynch-Staunton, in reply, referred to *Regina v. Smith* (1884), 4 O. R. 401.

November 24th, 1899. ROSE, J.:—

This was an application to quash by-law 999 of the corporation of the city of Hamilton, entitled, "Respecting the Public Health By-law and for Regulating and Licensing Milk Vendors."

The by-law was passed on the 27th March, 1899, to come into force on the first day of May, 1899, and provided (Paragraph 5) that "Every applicant for a license to engage in the business of dairyman or milk vendor shall, before receiving such license, sign an agreement in the form contained in schedule A. of this by-law." (Paragraph 7), "The medical health officer shall issue a license in the form contained in schedule B. appended to this by-law to every dairyman or milk vendor applying therefor who complies with the terms of this by-law."

The agreement in schedule "A." provides that if for certain reasons therein named, "the board of health may deem it necessary in the public interest to cancel or suspend the license, they shall have power to do so, on being satisfied that the condition of things exist which justifies such action."

The license provides: "This license may be cancelled by the local board of health of the city of Hamilton upon proof being given to their satisfaction of any violation by the licensee of the terms of the Public Health by-law of the city of Hamilton, or of the Public Health Act, or of the agreement signed by the said licensee as a condition of receiving this license."

The powers conferred upon the municipality may be found in R. S. O. 1897. Ch. 223, sec. 583, sub-sec. 23, enables councils of cities having less than 100,000 inhabitants to pass by-laws "For licensing and regulating milk

Judgment.

Rose, J.

vendors"; and section 550 enables the councils of cities to pass by-laws providing for the inspection of milk and provisions. Chapter 250 also provides for the inspection of milk supplies in cities. Chapter 252 has provisions to prevent fraud in the sale of milk in cities.

62 Vict. 2nd sess. ch. 26 (O.), being the Municipal Amendment Act, 1899, by section 29 provides for the granting or refusing of a license to any person to carry on a particular trade, calling, business or occupation, under any of the powers conferred upon the municipal council or Board of Police Commissioners of any municipality as by such Act shall be deemed to be in the discretion of the council or board as the case may be, and the council or board shall not be bound to state any reason for the granting or refusing of such license; and by section 37 (2) of the same Act, power is granted to the council to cancel licenses without stating any reason therefor.

The Act containing the power to grant and power to cancel without giving any reason for doing so, was assented to on the 1st April, 1899. Assuming, however, that such provisions apply to the by-law in question, it is objected that the by-law is *ultra vires* the council because it delegates to the board of health the power to cancel the licenses to be granted under the by-law, and I think this is so.

The power of the Legislature to confer upon municipalities power to pass by-laws for certain purposes was considered in *Hodge v. The Queen* (1883), 9 App. Cas. 117. See also *The Queen v. Burah* (1878), 3 App. Cas. 889. The principle of such decisions seems to make it clear that the attempt on the part of the council to give to the board of health the power to cancel the license in question was beyond the power of the council.

Having come to the conclusion that the by-law is invalid on this ground, I need not consider the other objections that were raised. I think the by-law must be quashed with costs.

G. A. B.

[DIVISIONAL COURT.]

REGINA V. LANGLEY.

Municipal Corporations—By-law—Transient Traders—Sale—Trading Stamps—Conviction—R.S.O. ch. 223, sec. 583, sub-secs. 30, 31.

The defendant arranged with various retail merchants that each should receive from him trading stamps the property in which, however, was to remain in him, and should pay him fifty cents per hundred stamps, and give one to each customer for every ten cents of cash purchases, while the defendant should advertise the merchants in certain directories and otherwise. A blank space was left in these directories for pasting in such stamps, and every customer who brought to the defendant one of the directories with a fixed number of stamps pasted in was entitled to receive in exchange any article he might select out of an assortment of goods kept in stock by the defendant. Apart from this the goods were not for sale :—

Held, that these transactions did not constitute a selling or offering for sale by the defendant within the meaning of a municipal by-law, passed under R. S. O. ch. 223, sec. 583, sub-sec. 30, 31.

THIS was a motion to make absolute an order *nisi*, Statement.
granted on May 2nd, 1899, to quash a conviction of the defendant, who was a member of a firm carrying on business under the name of Langley & Co. (The Dominion Trading Stamp Co.), of February 28th, 1899, by the police magistrate of the town of Brockville, for that he being a transient trader occupying premises in the town of Brockville, and not being entered upon the assessment roll, did, within thirty days preceding February 14th, 1899, offer goods and merchandise of various kinds, to wit, lamps and chairs within the municipality aforesaid, without having first paid the sum of \$250 for a license in that behalf, contrary to the municipal by-law passed on June 10th, 1895, entitled "A by-law for licensing transient traders."

The by-law referred to enacted that it should not be lawful for any transient trader occupying premises in the municipality, and not entered upon the assessment roll, to dispose of any goods or merchandise by sale or auction or in any other manner, conducted by himself or agent or otherwise, without having paid the sum of \$250 for a license in that behalf, and provided that the words "transient trader" should in addition to their ordinary meaning,

Statement. have the meaning given to the same by the Municipal Amendment Act of 1895.

The Municipal Amendment Act of 1895, 58 Vict. ch. 42, sec. 22 (now R. S. O. ch. 223, sec. 583, sub-sec. 31 (b)), provides that the words "transient traders" shall extend to and include any person commencing in the municipality, the business mentioned in sec. 489, sub-secs. 9 and 9a, of the Consolidated Municipal Act of 1892, 55 Vict. ch. 42, (now being sub-secs. 30 and 31 of R. S. O. ch. 223, sec. 583), namely, offering goods or merchandise of any description for sale by auction, or in any other manner conducted by themselves, or by a licensed auctioneer, or by their agent or otherwise.

The circumstances under which the defendant carried on business are stated in the judgment.

The form of agreement in use by the defendant was as follows:—

"We make business hum, increase merchants' trade, and bring in cash.

Memorandum of Agreement.

This agreement by and between Langley & Co. (Dominion Trading Stamp Co.), of Toronto, Ont., the parties of the first part, and.....of....., party of the second part:

Witnesseth, That the said party of the first part, for the consideration hereinafter mentioned, agrees with the party of the second part to perform in a faithful manner, the following: To print in the Directory of their Subscribers' Book, the name, business, and address of the party of the second part. To deliver at the homes of the people ofcopies of said books, soliciting their trade, and to instruct and to explain to them how they are to use the same, and in every way to use their best endeavour to promote the business interest and trade of the party of the second part. And the party of the second part agrees with the party of the first part, in consideration of the faithful performance of the foregoing, to receive from the

party of the first part a sufficient amount of Trading Stamps to supply all persons who may call for them. The stamps to be given out as follows: One stamp to be given for each and every ten cents represented in a purchase; ten stamps for one dollar, etc., the stamps to be given on cash sales. To pay party of the first part fifty cents per hundred for all stamps thus used. To make weekly settlements for each page used or given out. And party of the second part further agrees not to sell any stamps, and give them only to parties purchasing goods from their store. To co-operate in every way possible with the party of the first part to promote the best interests of all the merchants named in the book. To display "We give Trading Stamps" in a conspicuous place in their store. The parties of the first and second part mutually agree that this agreement shall remain in force during the pleasure of party of the second part.

(Sgd.) Langley & Co. (Seal.)

Per W. J. Flood.

Kindlings for a business fire. We furnish the fuel to make the pot boil.

Entered according to Act of Parliament of Canada in the year 1898 by Baldwin C. Hubbell at the Department of Agriculture."

The form of receipt given to the defendant by merchants was as follows :

' Dominion Trading Stamp Co.,
220 Yonge street, Toronto, Ont.

.....189

Received from Langley & Co. pad of Trading Stamps No., containing stamps. It is expressly understood that these stamps are the property of Langley & Co., and are consigned to be used according to contract.

Entered according to Act of Parliament of Canada in the year 1898, by Baldwin C. Hubbell, at the Department of Agriculture.'

The motion was argued on November 14th and 15th, 1899, before BOYD, C., and FERGUSON, J.

Argument. *J. B. Clarke, Q.C.*, for the motion, contended that the defendant was not a trader at all, and had not offered any goods or merchandise for sale; that there was no price put on the defendant's goods, nor was it any object to make a profit out of them; they were merely used as an inducement to make the advertising of the merchants dealing with the defendant effective, the goods being given to people as a sort of bonus for trading at particular shops; that to constitute a "trading" within the meaning of the statute there must be an offering for sale; that property in the trading stamps never passed out of the defendant but they were used as evidence by the persons presenting them of having traded with the merchants recommended: Benjamin on Sales, 4th ed., pp. 1, 2 and 89; Story on Sales, 9th ed., pp. 1 and 199, sub-sec. 216; *Harrison v. Luke* (1845), 14 M. & W. 139; *Williamson v. Berry* (1850), 8 How. (U.S.) 495, at p. 544; *McMichael v. Wilkie* (1891), 18 A. R. 464.

Aylesworth, Q.C., for the magistrate and the prosecutor, contended that there was here a sale of the trading stamps to the merchants, the price being the five per cent. commission paid to the defendant which was represented by the fifty cents paid per hundred trading stamps.

Clarke, in reply.

December 2nd, 1899. BOYD, C.:—

Counsel on both sides unite in asking us to decide this appeal upon the very substance of the transaction, disregarding matters of form and method of procedure. The broad question is thus presented whether the dealings of the Dominion Trading Stamp Company, as carried on by the defendant, are forbidden by the laws relating to transient traders. The conviction proceeds upon a by-law enacted under the provisions of the Consolidated Municipal Act, ch. 223, sec. 583, sub-secs. 30 and 31, and finds that the defendant then being a transient trader did offer for sale certain goods and merchandise without having paid the

license fee in that behalf. The short question is whether the defendant's method of disposing of his goods is "selling or offering them for sale in any manner." Judgment.
Boyd, C.

The defendant begins his operations by making contracts with merchants in different departments of business in (say) Brockville, that he will advertise them in his directory as well as in newspapers, and will distribute his directories by the thousands among the population, and in return supplies each merchant with a pad of trading stamps the property in which is to remain in Langley, while the merchant undertakes to give one stamp to each customer for every ten cents worth of goods purchased for cash. The merchant pays fifty cents per hundred to the defendant for all stamps thus used.

Then the holders of the directory are instructed to deal with the merchants named therein and to ask for stamps on every cash purchase. The stamps thus obtained are to be pasted in the directory which contains enough space to hold 990, and upon being brought full to the defendant's place of business, it will be exchanged or "redeemed" out of a variety of goods kept for that purpose. No price is put on these articles, but they are reckoned of equal value, and free choice among everything in stock is given to the holder of a book full of stamps. None of these goods are for sale, they can only be exchanged as indicated.

The elements of legal sale appear to be wanting. The various steps in the dealing are as follows: There is the transfer of the stamps as a voucher to the merchant who has no property in them, but has only to hand them as gifts to the purchaser from him. When the merchant pays fifty cents per hundred, that is only used as the measure by which he pays for the advertising done and trouble taken by Langley in his behalf. The stamp is the customer's evidence of having dealt on a cash basis with the advertised merchants, and he is at length able to get an article which costs him nothing by turning over a book full of stamps which is of no value to the defendant.

In the introduction to Blackburn's Treatise on Sale, 2nd ed., it is said "a contract concerning the sale of goods

Judgment.

Boyd, C.

may be defined to be a mutual agreement between the owner of goods and another, that the property in the goods shall for some price or consideration be transferred to the other . . . If the consideration to be given for the goods is not money, it might, perhaps, in popular language, rather be called barter than sale, but the legal effect is the same in both cases," p. ix. This definition should be qualified as it is put by Sir Joseph Napier in *The South Australian Ins. Co. v. Randell* (1869), L. R. 3 P. C., at p. 108: "Wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity * * it is a sale."

As put succinctly by Judge Chalmers in his edition of the Sale of Goods Act, p. 2, the essence of sale is the transfer of the property in a thing from one person to another for a price. Now "price" means pecuniary consideration: *Ex p. Saxe* (1832), 2 D. & Ch. at p. 180; *S. C.*, M. & Bl. at p. 139; and a contract of barter for commodities is legally distinct from a contract of sale for money consideration: *Harrison v. Luke* (1845), 14 M. & W. 139.

The essence of the defendant's system appears to be an advertising device by which local business is promoted and a cash trade stimulated. There is no competition between the defendant and the permanent traders of the locality who pay taxes and bear municipal burdens. His presence and activity is not in violation of the policy of the Act which is aimed at the migratory dealer in rival wares and so-called bankrupt stocks, the man who undersells the legitimate merchant and while injuring the ordinary channels of trade contributes nothing to the municipal treasury.

Neither in law nor in reason has there been a violation of the statute and by-law as to transient traders, and I think the conviction should be quashed, but it is not a case for costs against the town authorities.

A. H. F. L.

FERGUSON, J., concurred.

HORSMAN V. THE MUNICIPAL CORPORATION OF THE CITY
OF TORONTO.

Assessment and Taxes—Arrears of Taxes—Goods on Premises “Purchased from Owner”—R. S. O. ch. 224, sec. 135, sub-sec. 4 (b).

Goods purchased from a mortgagee of the owner or person assessed are not goods title whereof is claimed by purchase from the “owner or person assessed,” within the meaning of sec. 135, sub-sec. 4 (b) of the Assessment Act, R. S. O. ch. 224, and cannot be levied on for taxes in arrear in respect of the premises owned by the mortgagor of the goods.

THIS was an action to recover damages for an alleged Statement.
illegal seizure by the defendants of goods of the plaintiff
for taxes in arrear, and to recover the amount paid in
respect to such taxes, under the circumstances mentioned
in the judgment.

The action was tried before MEREDITH, C. J., at the non-jury sittings, Toronto, on November 3rd, 1899.

Brewster, for the plaintiff.

Fullerton, Q. C., and *Chisholm*, for the defendants.

December 13th, 1899. MEREDITH, C.J. :—

At the close of the argument I disposed of all of the matters in question except one, that of the right of the defendants to levy their distress for taxes upon such of the goods of the plaintiff as had been purchased from the Royal Loan Company. The taxes were those of the year 1897. In that year the premises, in respect of which the taxes were payable, were occupied by John C. Palmer, who carried on the business of an hotel keeper there, and the goods in question had belonged to him and been used by him in that business.

The Royal Loan Company were mortgagees of these goods by virtue of a mortgage from Palmer to them, dated the 13th day of July, 1896, and the mortgage contained a

Judgment.
Meredith,
C.J.

power of sale which empowered the mortgagees on default of payment to sell the mortgaged goods.

The mortgage being in default, the mortgagees on the 25th day of August, 1898, exercised the power of sale, and in pursuance of it sold the mortgaged goods to the plaintiff, and they were transferred to her by bill of sale dated on that day, and she thereupon entered into possession of them and remained in such possession carrying on the business of the hotel up to the time of the distress, which was made about the 7th January, 1899.

It was contended by the defendants that they were justified in distraining the plaintiff's goods.

The goods were not at the time of the levy the property of the "person assessed," or of the owner of the premises, but it was argued that they came within the definition contained in R. S. O. ch. 224, sec. 135, sub-sec. 4 (b).

I am unable to give effect to the defendant's contention. It cannot, in my opinion, be said that the title of the plaintiff to the goods was claimed "by purchase, gift, transfer or assignment, from the owner or person assessed, whether absolute or in trust or by way of mortgage or otherwise," within the meaning of the clause the provisions of which are invoked to support the defendant's contention.

The plaintiff's purchase was, it is true, from one who had derived his title from the person assessed, but the plaintiff did not claim title by purchase from the person assessed, but by purchase from the Royal Loan Company his mortgagees, and goods the title to which is so claimed are not, in my opinion, within sub-section 4 (b), which as I read it in the case of an absolute sale is applicable only where the owner or person assessed is the vendor, and the person whose goods are sought to be made liable to the distress is the purchaser from him: see *Edwards v. Edmunds* (1876), 34 L. T. N. S. 522; *Elve v. Boyton*, [1891] 1 Ch. 501; *In re Smith, Davidson v. Myrtle*, [1896] 2 Ch. 590.

There will, therefore, be judgment for the plaintiff for **\$1,137.44**, being the **\$987.44** paid by the plaintiff under protest, and **\$200** at which sum I assessed the damages for the defendants' trespass, with costs.

Judgment.
Meredith,
C.J.

A. H. F. L.

WARD

v.

THE MUNICIPAL CORPORATION OF THE TOWN OF WELLAND.

Municipal Corporations — By-laws Creating Debts — Local Improvement Debt — Validity of By-law — Directory Provision — R. S. O. ch. 232, secs. 384 (10) (d), 685 (2).

The provision in R. S. O. ch. 223, sec. 685 (2), that it shall be sufficient to state in any by-law for borrowing money on the credit of a municipality, that the amount of the general debt of the municipality as therein set forth is exclusive of the local improvement debts secured by special Acts, rates, or assessments, is merely directory, and the omission to observe it is not fatal to a by-law otherwise valid on its face.

THIS was a special case submitted to the Court to determine the validity of by-laws Nos. 112, 113, and 114, of the town of Welland, finally passed by the town council of Welland on June 28th, 1899, under the circumstances stated in the judgment. Statement.

The by-laws were respectively to raise the sum of **\$21,000** for the purpose of building permanent sidewalks and streets in the town of Welland; to raise the sum of **\$8,000** for the purpose of building a town hall in the town of Welland; and to raise the sum of **\$11,000** for the purpose of erecting a public school building in the town of Welland, and in each case to authorize the issue of debentures for the purposes mentioned. None of the by-laws contained the statement directed in sec. 685 (2) of the Municipal Act, R. S. O. ch. 223, that the amount of the general debt of the municipality as therein set forth was exclusive of local improvement debts, secured by special Acts, rates, or assessments.

Argument. The case was argued before BOYD, C., on November 30th, 1899.

Bicknell, for the plaintiff, contended that the recital in the by-laws was incorrect and misleading to voters.

German, Q.C., for the town contended that the words above referred to in sec. 685 (2) was merely directory and their absence not a fatal objection to the by-laws, and he also relied on *In re Lloyd and Township of Elderslie* (1879), 44 U. C. R. 235; *Grierson v. The Provisional Municipal Council of the County of Ontario* (1852), 9 U. C. R. 623; *Re Secord and the Corporation of the County of Lincoln* (1864), 24 U. C. R. 142; *Re John Milloy and the Municipal Council of Onondaga* (1884), 6 O. R. 573.

Bicknell, in reply, referred to R. S. O. ch. 223, sec. 384, and contended that section 685 was an exception from it and could not be merely directory.

November 30th, 1899. BOYD, C.:—

Section 384 of the Municipal Act (R. S. O. ch. 223) says that no by-law creating debt shall be valid which is not in accordance with the following restrictions and provisions, of which No. 10 (d) is thus expressed—The by-law, unless it is for a work payable by local assessment, shall recite the amount of the existing debenture debt of the municipality.

These by-laws are not for works payable by local assessment and they contain an amount representing the existing debenture debt.

But the objection is that the amount is not correctly stated or that no reference is made in the by-law to an amount of some \$3,200 debt on debentures issued under local improvement by-laws secured by special assessment, out of which it is admitted \$900 was a direct liability on the town of Welland, the defendant municipality.

It is right, I think, not to add this to the debenture debt to be mentioned in the by-law, because by sec. 685 (2) of the Act it is declared that the debentures under local

improvement by-laws on the security of special assessment form no part of the general debt of the municipality, and it is provided there that it shall not be necessary to recite the amount of local improvement debt so assured by special rates on any by-law for borrowing money. So far then the by-laws are not open to objection under sec. 384, and there is nothing affecting their validity under that section which would vitiate these by-laws.

Judgment.

Boyd, C.

The point of difficulty arises in the closing words of sec. 685 (2), which is, that it shall be sufficient to state in any such by-law that the amount of the general debt of the municipality as therein set forth, is exclusive of local improvement debts secured by special rates or assessments. This is, I think, a directory provision the omission to observe which would not be fatal to a by-law otherwise valid on its face. This appears to be rather a provision added *ex abundanti cautela* than one which affords any information. The effect of the municipal legislation is to except the local improvement debts specially provided for from being counted as part of the general debt of the municipality, and this being mentioned on the face of the by-law merely suggests that there are such local improvement debts. While the direction so to specify on the face of the by-law should be observed as a matter of legislative requirement, I do not think that the Court should for that omission alone exercise its discretionary power against the validity of the by-law otherwise unimpeachable: see *In re Lloyd & The Corporation of Elderslie* (1879), 44 U. C. R. 235.

Sec. 685 is a comparatively new provision as compared with sec. 384, being first introduced in 1883 (46 Vict. ch. 18, sec. 623), and it contains no provision that the failure to observe what is now complained of shall render the by-law bad: see *In re Sells and The Municipality of St. Thomas* (1853), 3 C. P. 291.

Dismiss action with costs.

A. H. F. L.

PALMER V. MCKNIGHT.

Receiver—Mortgage—Purchaser of Equity—Covenant to Indemnify.

A judgment creditor of a mortgagor upon covenants in the mortgage cannot obtain a receivership order to enforce payment by a purchaser of the equity who, on purchasing, has agreed to assume and pay the mortgage, though he sue and make the application on behalf of himself and all other creditors of the mortgagor.

Statement. THIS was an application for the appointment of a receiver under the following circumstances:—An action was brought by the plaintiff, suing on behalf of himself and all other creditors of the defendant against him upon the covenants contained in two mortgages made to plaintiff, and judgment was recovered against the defendant on January 18th, 1898, for the amount due, and writs of execution were subsequently placed in the sheriff's hands. Nothing, however, had been paid or collected in respect of the judgment debt, and the plaintiff deposed that he knew of no assets of the defendant out of which it could be collected.

By deed dated April 18th, 1890, the defendant had conveyed the lands comprised in one of the mortgages to Thomas Culliton, subject to the mortgage, which the latter, as recited in the deed undertook to assume and pay as part of the consideration money, and though he had not executed the deed, he had for a certain time paid the instalments of interest upon the mortgage; and he had recently died. The defendant had been frequently requested on behalf of the plaintiff to assign his right to be indemnified against the amount of the mortgage by the estate of Culliton and compel payment of same by the estate, but he had always declined to do so.

The plaintiff asked for a receiver of all the rights and benefits of the defendant under and by reason of the covenant or obligation of Culliton to assume and pay off the above mortgage, and for an order authorizing the receiver so appointed to take such proceedings, either in his own

name or in the name of the defendant against the representatives of Culliton's estate, to compel payment of the moneys due under the latter's covenant or obligation. Statement.

The motion was heard on May 4th, 1899, before ROSE, J.

W. H. Blake, for the plaintiff.

Marsh, Q.C., for the National Trust Company of Ontario, the administrators of the estate of Thomas Culliton.

The following cases were referred to: *Campbell v. Morrison* (1897), 24 A. R. 224; *Mones & Co. v. McCallum* (1897), 17 P. R. 398; *British Canadian Loan Co. v. Tear* (1893), 23 O. R. 664; *The Central Bank v. Ellis* (1896), 27 O. R. 583; *Beatty v. Fitzsimmons* (1893), 23 O. R. 245; *Oliver v. M'Laughlin* (1893), 24 O. R. 41; *Gilbert v. Jarvis* (1869), 16 Gr. 265; *Blake v. Jarvis* (1870), 17 Gr. 201; *Leslie v. Calvin* (1885), 9 O. R. 207; *Canada Landed and National Investment Co. v. Shaver* (1895), 22 A. R. 377; *Allen v. Furness* (1892), 20 A. R. 34.

May 20th, 1899. ROSE, J.:—

Apart from any other answer to this application for a receiver to enforce the payment by the purchaser of the equity of redemption of the mortgage debt, if the application were made on behalf of all the creditors of the mortgagor except the mortgagee, the practical answer would be that the receiver could get nothing for the benefit of such creditors, as the money when received must, according to the rights of the mortgagor and mortgagee and the purchaser of the equity, be paid to the mortgagee, and so no other creditor could be interested in the matter. And it is plain that the mortgagee *quod* mortgagee would have no right to take proceedings to compel the purchaser of the equity to pay the money to him.

In *Campbell v. Morrison* (1897), 24 A. R., at p. 237, the present Chief Justice of Ontario states the law as follows: "In one of the cases to which I have referred, the Chancellor distinctly repudiates the idea of any right being

Judgment.
Rose, J.

acquired by the mortgagee, on the ground that the contract was made for his benefit, so that in that view, if there had been an express contract by the defendant with the mortgagor to pay this mortgage, that would manifestly give no right of action to the mortgagee, the contract not being made for his benefit."

If a receiver for creditors other than the mortgagee could not enforce payment of this debt, and if the mortgagee has no rights *quod* mortgagee, I do not see how the appointment of the mortgagee as receiver could make any difference.

But the case of *Irving v. Boyd* (1868), 15 Gr. 157, is a direct authority against the application. The head note fairly gives the result of the case: "A chose in action can be reached by process of sequestration, but the right or interest of a surety in regard to the money for the payment of which he is surety, is not property of such a nature as can be reached by that process. Where, therefore, a mortgagee filed his bill against the assignee of the equity of redemption to enforce by this means payment of the deficiency arising on a sale of the mortgaged premises, it was held that the right of the mortgagor to call upon his assignee to discharge the mortgage debt was not of such a nature as could be reached."

The learned Chancellor (Spragge) said, at p. 164: "Is this property? Is it anything more than a potential equity? Is not the word property as used in the writ used in the sense of ownership?"

I regret that the application fails, for I adopt the language of Chancellor Spragge in *Irving v. Boyd*, where he said, at p. 164: "I should, I confess, have been very well pleased if I could see my way to a different conclusion, for the plaintiff fails in his remedy, as far at least as my judgment goes, from what I cannot but regard as a defective state of the law." But notwithstanding my sympathy with the application, I must do as was done in *Irving v. Boyd*, refuse the application with costs.

[DIVISIONAL COURT.]

MYERS V. BRANTFORD STREET R. W. CO.

*Street Railways—Operation of Electric Car—Duty of Motor Man—
Frightening Horses—Nonsuit.*

It is the duty of a motor man, operating an electric car upon a public street, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse; and it is also his duty in running the car to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams.

Ellis v. Lynn and Boston R. R. Co. (1893-4), 160 Mass. 341, applied.

Held, in this case, STREET, J., dissenting, that the fair inference from the evidence was that the motor man saw that the plaintiff's horses were becoming frightened by the moving car, and that they were likely to become unmanageable and run away, and that he saw the signal given by the plaintiff and understood it to be a signal for him to stop the car; and it was his duty, under these circumstances, to do what he reasonably could to avoid the obvious danger; and the case should not have been withdrawn from the jury.

THIS was an action for damages for injuries sustained by the plaintiff by reason of the alleged negligence of the defendants in the operation of an electric motor car in the city of Brantford. The plaintiff was driving a pair of horses in a waggon in the streets of that city, when they became uneasy owing to a passing railway train. When the train had passed, the plaintiff saw that the defendants' car was about to start in front of him, and he waved his hand to the motor man intending it as a signal to stop, which he did not do, but went on, and the horses in charge of the plaintiff bolted, the waggon was upset, and the plaintiff injured. It was alleged, also, that the same motor man had met the same horses two weeks before, and, observing their fright, had stopped his car to allow them to pass. Statement.

The action was tried before BOYD, C., and a jury, at Brantford.

Statement. At the conclusion of the plaintiff's case the trial Judge took it from the jury and dismissed the action.

The plaintiff moved for a new trial, on the ground that there was evidence of negligence to go to the jury.

The motion was heard by a Divisional Court, composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on the 9th November, 1899.

Brewster, Q. C., for the plaintiff, cited *Croswell* on Electricity, pp. 617, 618; *Green v. Toronto R. W. Co.* (1895), 26 O. R. 319; *Lines v. Winnipeg Electric Street R. W. Co.* (1896), 11 Man. L. R. 77; *Gordon v. City of Belleville* (1887), 15 O. R. 26; *Ewing v. Toronto R. W. Co.* (1894), 24 O. R. 694; *Gosnell v. Toronto R. W. Co.* (1894-5), 21 A. R. 553, 24 S. C. R. 582; *Atkin v. City of Hamilton* (1897), 24 A. R. 389.

Sweet, for the defendants, referred to *Beven* on Negligence, 2nd ed., p. 150 *et seq.*; *Simkin v. London and North Western R. W. Co.* (1888), 21 Q. B. D. 453; *Eastwood v. La Crosse City R. W. Co.* (1896), 68 N. W. Rep. 651; *Bishop v. Bell City Street R. W. Co.* (1896), 65 N. W. Rep. 733; *Yingst v. Lebanon & A. Street R. W. Co.* (1895), 31 Atl. Rep. 687; *Dewey v. Chicago, Milwaukee, and St. Paul R. W. Co.* (1898), 4 Am. Neg. Rep. 92; *New Brunswick R. W. Co. v. Vanwart* (1889), 17 S. C. R. 35; *Booth's Street Railway Law*, sec. 298.

January 2, 1900. ARMOUR, C.J.:—

The law was correctly laid down in *Ellis v. Lynn and Boston R. R. Co.* (1893-4), 160 Mass. 341, where it is said, at p. 350: "It is a well-known fact that most horses are frightened at their first view of a moving electric car, especially if they encounter it in a quiet place away from the distracting noises of a busy city street. It is only by careful training, and a frequent repetition of the experience, that they acquire courage to meet and pass such a car on a

narrow street without excitement. The rights of the driver of a horse and the manager of an electric car under such circumstances are equal. Each may use the street, and each must use it with a reasonable regard for the safety and convenience of the other. The motor man is supposed to know that his car is likely to frighten horses that are unaccustomed to the sight of such vehicles, while most horses are easily taught after a time to pass without fear. It is his duty, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse, and it is also his duty in running the car to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams. In this way the convenience and safety of everybody can be promoted without serious detriment to anybody."

Judgment.
Armour, C.J.

Applying the law so laid down to the case in hand, I feel bound to hold that it was improperly withdrawn from the jury.

The fair inference from the evidence is that the motor man saw that the plaintiff's horses were becoming frightened by the moving car, and that they were likely to become unmanageable and run away, and that he saw the signal given by the plaintiff and understood it to be a signal for him to stop the car, and it was his duty under these circumstances to do what he reasonably could to avoid the obvious danger.

There must be a new trial, and the costs of the last trial and of this motion must be paid by the defendants forthwith after taxation thereof.

FALCONBRIDGE, J. :—

I agree with the result of this judgment.

Judgment. STREET, J. :—

Street, J.

In my opinion, the nonsuit was right and should not be disturbed.

The evidence shortly is this. When the freight train had passed, the plaintiff with his horses and waggon was on one side of the railway track, and the motor man with the street car was on the other side at a distance of forty-four yards. The horses were standing quietly, and the car was not in motion. The plaintiff threw up his arm, and immediately afterwards the motor man started the car, and the plaintiff started his horses. As they approached one another the horses became excited and swerved, and, just as they met the car, the waggon was driven against the telegraph post, and the plaintiff was thrown out and injured.

The car was not going at an excessive or improper rate of speed, and, so far as the evidence shews, the gong was not sounded. The signal given by the plaintiff by throwing up his arm was an equivocal one and might mean either "stay where you are" or "come on." There is no evidence to shew that the motor man saw it—he was forty-four yards away when it was given—or if he saw it that he understood it in the sense in which the plaintiff says that he intended it. The inference rather seems to be that if he saw it he understood it as a request to "come on," for the plaintiff and his witnesses say that as soon as the signal was given he started the car. But if he saw it, and understood it, was there any reason why he should pay heed to it? According to the evidence the plaintiff's horses were standing quietly when it was given, shewing no signs of fright, and there was no reason why the car should not proceed on its course. It is said that some ten days or two weeks before, the plaintiff with these horses had met the same motor man and his car upon another street, and that the motor man at the request of a third person had stopped the car and allowed the plaintiff to drive his horses past because they shewed fright at it.

It is argued that the motor man should have done the same thing again because he had learned at that time that these horses would not pass a moving car, and that his not having done so was negligence. It seems to me that this is going a long way to find something upon which to base a charge of negligence. It can hardly be held that a motor man is bound to observe and remember, in addition to his other duties, the behaviour of all the different horses he may pass in the course of a fortnight upon the streets of a town, under penalty of being held guilty of negligence if he fails to do so! I can find nothing in what the motor man here is proved to have done which a reasonable man might not reasonably and properly have done, and so finding, I cannot find that he has been guilty of negligence.

Judgment.

Street, J.

It was suggested at the argument, for the first time, that the defendants are not shewn to have been lawfully operating their railway because no by-law authorizing them to do so was proved. This argument, however, it seems to me, should not be allowed to prevail. The statement of claim states that the defendants own and operate the railway upon the street in question, and it is not stated that they are doing so unlawfully or without leave, nor was this suggested to the Chancellor at the trial.

In my opinion, the motion should be dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

RE HARRISON.

Life Insurance—Benefit Society—Certificate—Indorsement for Benefit of Wife—Subsequent Revocation by Will—By-laws of Society—R. S. O. ch. 203.

A certificate of life insurance issued to a member by a benefit society stated on its face that it was subject to the provisions of the by-laws, rules, and regulations of the society. One of the by-laws provided for the payment of the insurance money to any person nominated by indorsement, which indorsement might be revoked. The member, by indorsement on the certificate, directed that all money accruing upon it should be paid to his wife upon his death; but, subsequently, by will directed that only a portion of it should be paid to her, and the balance to his half brothers and sisters:—

Held, that the insurance was subject to the provisions of the Ontario Insurance Act, R. S. O. ch. 203; and the by-laws and rules of the benefit society, in so far as they were inconsistent with such provisions, were to be regarded as modified and controlled by them. The statute provided in effect that when the indorsement was in favour of the wife of the member, he could not revoke it, and the by-law was in this respect modified and controlled by the statute.

Mingeaud v. Packer (1891-2), 21 O. R. 267, 19 A. R. 290, applied and followed.

Statement. JOHN HARRISON, a brakeman in the service of the Grand Trunk Railway Company, died, as the result of an accident, on the 17th February, 1899. He was insured for \$1,000 in the Grand Trunk Railway Insurance and Provident Society, under a certificate set out in the judgment of BOYD, C. He was married to Nellie Harrison, a girl of seventeen, on the 28th June, 1898, and on the 21st January, 1899, he indorsed this insurance certificate in her favour absolutely. On his death bed he made a will, purporting to bequeath to her \$360 out of his insurance in the "G. T. Benevolent Association," and the balance of his "property real and personal" he thereby divided equally between five half brothers and sisters.

The widow applied upon originating notice before BOYD, C., in Chambers, on the 16th October, 1899, after service on the executor of the will and the official guardian only, for an order declaring the proceeds of the insurance policy, which had been paid into Court by the society, to be hers

absolutely. BOYD, C., directed that two of the beneficiaries named in the will should be served with notice, and this having been done, the motion came up again on the 20th October, 1899. Argument.

F. A. Anglin, for the applicant. The case is covered by *Mingeaud v. Packer* (1891-2), 21 O.R. 267, 19 A.R. 290. The insurance having been made payable by the deceased to the widow, one of the class of preferred beneficiaries, he was prevented by R. S. O. ch. 203, sec. 151, sub-sec. 3, and sec. 159, sub-sec. 1, notwithstanding any provision in the rules and by-laws to the contrary, from diverting the insurance moneys or any part of them to beneficiaries not within the class preferred: *Fisher v. Fisher* (1898), 25 A. R. 108; *Neilson v. Trusts Corporation of Ontario* (1894), 24 O. R. 517. The will is not a sufficient revocation, even if the insured had power to revoke. The rules do not contemplate revocation by will: the will does not expressly revoke.

R. S. Smellie, for the executor, submitted his rights to the Court.

F. W. Harcourt, for the official guardian.

No one appeared for the beneficiaries.

October 23, 1899. BOYD, C.:—

Harrison became a member of the Grand Trunk Railway Insurance and Provident Society on the 22nd December, 1898.

The current certificate at his death was dated 12th January, 1899. It is indorsed payable to his wife, Nellie Harrison, on 21st January, 1899. He was injured and died in February, 1899, and just before death made a will. It is without date, but is said to have been duly signed about 17th February, 1899.

In this he bequeathes to his wife, Nellie Harrison, the sum of \$360 to be paid by his executor out of the insurance in the "G. T. Benevolent Association," and balance of estate to be equally divided among five relatives named and described.

Judgment.
Boyd, C.

This is on its face repugnant to the indorsement of the insurance certificate, and I take it as sufficiently referring to that certificate, though the name "G. T. Benevolent Association" is not in form identical with the proper name of the insuring society.

If the indorsement could be revoked by will, it has been sufficiently and expressly revoked.

It is said that the by-laws of the society, if they permit a change in the indorsement, contemplate that it shall not be by will; and, second, that the by-laws do not operate so as to override the statute, and the attempted revocation is inoperative in any event.

The certificate and indorsement read as follows:

No. 8767.

Class "C."

Grand Trunk Railway Insurance and Provident Society.

This is to certify that John Harrison, of York, in the employment of the Grand Trunk Railway Company and now employed as a brakeman, is a member of the Grand Trunk Railway Insurance and Provident Society, and is entitled in his lifetime while such member to the benefits of the said society under and subject to the by-laws, rules, and regulations thereof, from time to time in force, and upon his death, being then a member, to have the assessment or death levy paid, distributed, or applied, as in or by said by-laws, rules, and regulations for the time being may be provided.

This certificate is issued upon the condition that the said member, and his widow, children, next of kin, and legal representatives, and all the rights and benefits arising from such membership, are to be subject to the provisions of the by-laws, rules, and regulations of the society from time to time in force.

In witness whereof the chairman and secretary have hereunto set their hands this 12th day of January, 1899.

F. Hitchon, Chairman } *Executive Committee.*
H. A. Sisson, Secretary }

Signature of member: John Harrison.

Date of membership, 22nd December, 1898.

Indorsement.

Judgment.

York, January 21st, 1899.

Boyd, C.

Upon my death pay to my wife,

Nellie Harrison,

Escenaba, Mich.,

of Delta County, Mich.,

all insurance money accruing upon within certificate.

(Signature) John Harrison.

Witness, Thos. O'Connor, G. T. R., York.

One of the by-laws, subject to which the certificate is issued, provides that the insurance money may be paid to the person nominated by indorsement upon the certificate of membership (which here applies to the indorsement to the wife) and provides further that such indorsement is subject to revocation by * * a revocation in writing on a separate paper signed by the member in the presence of at least one subscribing witness.

It further states that no declaration or revocation on a separate paper from the certificate shall have any effect until delivered to the secretary-treasurer of the society. The will has been brought to the notice of the society, and they have acted upon it so far as to pay the fund, \$1,000, into Court. I take it that the execution of the will is sufficient to operate as a revocation in this case—if there was any power to revoke.

This leads to the main question, whether the by-laws are repugnant to the statute which it is said applies to this insurance: R. S. O. ch. 203, sec. 159; and *Mingeaud v. Packer* (1891-2), 21 O. R. 267, 19 A. R. 290, is said to be conclusive

Having referred to the appeal book in *Mingeaud v. Packer* (1892), 19 A. R. 290, I find that the certificate under which the successful parties claimed was made payable to them unconditionally on its face, and was thus expressed, "that the person insured was entitled to participate in the beneficiary fund of the Order to the amount of \$2,000, which sum shall at his death be paid to his children" in the proportions named. The insured sought to revoke

Judgment. this after his remarriage, in favour of his second wife, by
Boyd, C. indorsement thereon, but the majority of the Judges held that the first certificate had by the effect of the statute operated as a trust in favour of the children, and was not capable of revocation under the statute.

The distinction in the present case is a tangible one, and is sufficient, in my judgment, to cause the scale to turn in favour of the opinion expressed by the trial Judge, and by two of the Judges in appeal, that the rules of the society are so incorporated with the contract of insurance on its face, that they remain operative by express convention, and so exclude the general terms of the statute. The insurance was made and the indorsement of it to the wife was expressly subject to modification, and on the condition that the certificate was issued so that the member and his widow, etc., and all benefits and rights arising from such membership, were to be subject to the provisions of the by-laws, rules, and regulations of the society. Among these is the power of revocation and renominating the beneficiaries, and that has been validly effected, as I think, by the will.

The money in Court, after deducting costs to be taxed, is to be distributed according to the directions of the will.

The applicant and the official guardian appealed from the order of BOYD, C., and the appeal was heard by a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE, J., on the 6th November, 1899.

F. A. Anglin, for the applicant and for the official guardian, repeated the argument given above.

G. F. Macdonnell, for the beneficiaries. The trust created by the indorsement was qualified or conditional; the right of revocation, being expressly reserved, was validly exercised: *McKibbin v. Feegan* (1893), 21 A. R. at p. 90. The insured may reapportion by will: *Racher v. Pew* (1899), 30 O. R. 483. The rules of the insurance society govern, being part of the contract: *Fawcett v. Fawcett* (1899), 26 A. R. 335: and the designation, being thereby qualified, is

revocable: *Hallendal v. Hillman* (1891), 28 O. R. 342n. Argument.
The revocation is sufficient here: *Re Wilson* (1899), 30 O. R. 553. *Fisher v. Fisher* (1898), 25 A. R. 108, is not in point, and *Mingeaud v. Packer* (1891-2), 21 O. R. 267, 19 A. R. 290, is distinguishable.

R. S. Smellie, for the executor. The indorsement being made under the by-laws is only operative under them, and is governed by them, and is therefore revocable.

Anglin, in reply. The statute governs, and the by-laws must be construed as conforming thereto, and as applying only to cases in which the statute permits such changes to be made. In no case has a designation of a member of the preferred class under the statute been held revocable in favour of others not of that class. *Mingeaud v. Packer* cannot be successfully distinguished.

January 4, 1900. The judgment of the Court was delivered by

ARMOUR, C. J. :—

The decision of this Court in *Mingeaud v. Packer* (1891-2), reported in 21 O. R. 267, and affirmed in appeal, 19 A. R. 290, is decisive of this case.

The insurance in the present case is subject to the provisions of the Ontario Insurance Act, R. S. O. ch. 203; and the by-laws and rules of the Grand Trunk Railway Insurance and Provident Society, in so far as they are inconsistent with such provisions, must be held to be modified and controlled by them.

This is the effect of the decision in *Mingeaud v. Packer*, and this case cannot be successfully withdrawn from the operative effect of the decision in that case.

The by-law of the society provides generally for the payment of the insurance money to any person nominated by the member by indorsement, which indorsement may be revoked by the member; the statute, however, provides in effect that when the indorsement is in favour of the wife of the member, the member cannot revoke it.

Judgment. And, in my opinion, the by-law of the society must be held in this respect to be modified and controlled by the statute.

The appeal will, therefore, be allowed, and the money in Court will be declared to be the money of the appellant and payable to her when she becomes of age. The costs of the appellant and of all the other parties, including the executor, will be paid by the executor out of the estate of the testator which devolved on him as such executor.

E. B. B.

[DIVISIONAL COURT.]

RAE V. RAE.

Alimony—Desertion—Offer to Receive Wife Back—Bona Fides.

In an action for alimony, on the ground of desertion, in order to give effect to the husband's offer and willingness to receive back his wife, the Court must be satisfied that it is made *bona fide*, and not merely set up to prevent the pronouncement of judgment against him.
Crothers v. Crothers (1868), 1 P. & D. 568, specially referred to.

THIS was an action for alimony tried by MEREDITH, Statement.
C. J., on the 20th and 21st April, 1899, at Toronto. The facts, so far as material, are set out in the judgment.

Aylesworth, Q.C., for the plaintiff.

Holman, for the defendant.

June 16, 1899. MEREDITH, C. J.:—

The ground upon which the plaintiff bases her claim to alimony is desertion, and that she has, in my opinion, established by the evidence, as I intimated at the close of the case.

The defendant, however, contends that a judgment in favour of the plaintiff should not be pronounced because, as he alleges, he has offered and is still willing to receive his wife back.

I am not, however, satisfied, especially as the defendant did not offer himself as a witness in support of that ground of defence, that any *bona fide* offer was ever made by the defendant, or that he is now really willing to receive his wife back. His conduct is, I think, consistent only with the view that his offer and his alleged willingness to receive his wife back are put forward merely for the purpose of preventing a judgment being pronounced against him, and without any real intention or desire to receive her back or to provide a home for her.

I find that in a proceeding in the English Divorce Court for restitution of conjugal rights, it is now provided by a

Judgment. Rule (176) that at any time after the commencement of proceedings the respondent may apply by summons to the Judge, or to the Registrar in his absence, to stay the proceedings by reason that the respondent is willing to resume or return to cohabitation with the petitioner: Browne & Powles's Law of Divorce, 5th ed., p. 142.

Meredith,
C.J.

In *Crothers v. Crothers* (1868), 1 P. & D. 568, the respondent, in answer to a petition for the restitution of conjugal rights, denied that he had refused to permit the petitioner to cohabit with him and to render to her conjugal rights, and alleged his willingness to cohabit with the petitioner, and render to her conjugal rights. On a motion to the Judge Ordinary for directions as to the mode of trial, he ordered the motion to stand over with leave to both parties to file affidavits, and he said that the respondent "must satisfy him that he was and is willing to receive back his wife, and that no demand had been made upon him to do so."

This practice is in accordance with what I have decided, and justifies me, not having been satisfied of what the Judge Ordinary required the respondent to satisfy him of in the case referred to, in declining to give effect to the defendant's contention.

There must be judgment for the plaintiff with costs, and a reference to the local Master at Perth to fix the amount to be allowed to her for alimony.

The defendant appealed from the judgment of MEREDITH, C. J., and his appeal was heard by a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on the 8th November, 1899.

Holman, Q. C., for the defendant. The policy of the law is that the husband and wife should live together. Whether the offer to take her back is or is not made in good faith is not a matter for the Court. The most favourable judgment the plaintiff can get is that which was given in *McKay v. McKay* (1858), 6 Gr. at p. 383. I refer also to *Snider v. Snider* (1885), 11 P. R. at p. 142; *Walsh v.*

Walsh (1864), 1 Ch. Ch. 234; *Gracey v. Gracey* (1870), *Argument*. 17 Gr. 113; *Hagarty v. Hagarty* (1865), 11 Gr. 562. The offer to take back the plaintiff is sufficient.

Aylesworth, Q. C., for the plaintiff, referred to Thicknesse on the Law of Husband and Wife, pp. 294, 295.

January 31, 1900. The judgment of the Court was delivered by

FALCONBRIDGE, J.:—

As to the correctness of the learned Chief Justice's judgment there can be no question, unless the defendant can shelter himself behind his alleged willingness to have the plaintiff come and live with him.

The trial Judge has made a finding of fact strongly, and in my opinion correctly, against the good faith of the defendant's offers in that direction. Two former efforts in that line were perfectly illusory and abortive owing to his neglecting or being unwilling to make proper provision for her reception or maintenance in a house of his.

During the discussion at the trial the Chief Justice remarked that the defendant did not go into the box to pledge his oath to his good faith and to the honesty of his offer. There appears to have been no request then by his counsel to be allowed to put him in the box, although the defendant was at the trial, as appears by his affidavit sworn 21st June last. In that affidavit he makes the uncorroborated statement that he was not a witness owing to his "state of ill-health and nervous condition."

The affidavits filed on this motion on the defendant's behalf do not advance the case at all, except to demonstrate his extreme (and perhaps natural) anxiety to get rid of the judgment.

After the Master shall have made his report something might be done in the way of the suggestion made by Mowat, V.-C., in *Cronk v. Cronk* (1872), 19 Gr. at p. 287:—

Judgment. " If the defendant really wishes to be reconciled to his wife, for any other purpose than the contemptible one of getting rid of the small allowance which the Master has made to her * * let him obtain his wife's consent to return to him ; * * and let him offer to give a binding stipulation that her little allowance shall not be imperilled or lost by her acceding to his professed wishes, but shall be continued notwithstanding the renewal of cohabitation * * . "

In the meantime the appeal will be dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

SWAIZIE V. SWAIZIE.

Foreign Law—Judgment Granting Divorce and Alimony—Domicile—Submission to Jurisdiction—Evidence—Production of Foreign Record.

An action by a husband, who had been married in Ontario, in a foreign State, for a divorce *a vinculo*, on the ground of the adultery and cruelty of his wife resulted in favour of the latter, and judgment dissolving the marriage was granted to her, and by it she was awarded a sum of money as alimony. Subsequently the wife sought in this action to recover the amount of the alimony, and it was contended by the husband that as he had never acquired the necessary domicile to give the foreign Court jurisdiction to grant the divorce the judgment was invalid :—

Held, that as he had invoked and submitted to the jurisdiction of the foreign Court, he had precluded himself from setting up want of jurisdiction.

Held, however, were this not so, that in the absence of anything appearing on the face of the foreign proceedings to shew want of jurisdiction the production of the record was *prima facie* evidence entitling the wife to recover in this action, and although the presumption in favour of the judgment might be rebutted, clear proof of the facts to shew want of jurisdiction must be adduced.

Held, also, that the wife was entitled to judgment for payment of the alimony, although the amount was arrived at upon a consideration of the value of the lands of the husband in Ontario.

Semble.—Had the foreign judgment provided for the division in specie of the husband's property in Ontario it would not have been invalid.

Judgment of ROBERTSON, J., *ante* 81, reversed.

Statement. THIS was an appeal by the plaintiff from the judgment of ROBERTSON, J., reported *ante* p. 81.

The facts sufficiently appear in the judgments of the **Statement.**
trial Judge and the Divisional Court.

The appeal was argued on December 4th, 1899, before a Divisional Court composed of MEREDITH, C. J., ROSE, and MACMAHON, JJ.

German, Q. C., for the appeal. The lien on the land under the American judgment is not pressed for. The trial Judge in finding against such a lien overlooked the fact that the judgment was for a certain amount, viz., \$800. The American Court could not and did not declare a lien on land in this country, but it could and did find an amount due based on the value of property owned by the defendant. The American judgment is binding on the defendant here.

A. J. Russell Snow, contra. The judgment dealt with the \$800 as "a full and final division of" the estate or property. The parties were not domiciled within the jurisdiction of the American Court, and such domicile was necessary in order to confer jurisdiction to try the divorce action: *Briggs v. Briggs* (1880), 5 P. D. 163. The judgment was granted on grounds which would not have supported it in this country. There was a want of domicile, and the facts would not have supported an action for alimony here, and it is contrary to natural justice, and a new judgment will not be made in place of it. There was no debt ascertained and found by the judgment: *Price v. Dewhurst* (1838), 4 My. & C. 76. In any event it was not a final judgment, as in the event of the amount not being paid, the wife had to apply to the Court for an order to enforce payment. I refer also to *McGurn v. McGurn* (1885), 11 A. R. 178; *Niboyet v. Niboyet* (1878), 4 P. D. 1; *Story's Conflict of Laws*, Redfield ed., 739.

German, in reply. This Court will not go behind the American judgment on the ground of want of jurisdiction which was invoked and submitted to by the defendant

Argument. now objecting to it. Even if the foreign judgment proceeded on a mistake as to English law, or all the facts were not before the foreign tribunal, our Courts will not sit in appeal from that tribunal, but recourse must be had to the mode of appeal provided in the foreign country : *In re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600.

December 13th, 1899. MEREDITH, C. J. :—

This is an appeal by the plaintiff from the judgment pronounced by Mr. Justice Robertson after the trial of the action by him, without a jury, at the spring sittings at Welland on the 6th March, 1899, dismissing the action with costs.

The action is brought on a judgment recovered in the Superior Court of Milwaukee county, in the State of Wisconsin, one of the United States of America, by the plaintiff against the defendant on the 8th of October, 1898, for \$800, and the plaintiff in her pleadings claims to recover that sum with interest and costs, and she also claims a declaration that she is entitled to a lien and charge for the amount of the judgment on certain lands of the defendant in the county of Welland, alleging that it is made a lien and charge on the lands by the judgment of the Wisconsin Court.

The defendant by his statement of defence, besides putting in issue the recovery of the judgment, alleges that at no time during the course of the action in which the judgment was recovered, was he a citizen of the United States of America, or resident in the State of Wisconsin : that he was and is a British subject : that his marriage with the plaintiff, who is his wife, was contracted in Ontario, and he alleges that the Court by which the judgment was pronounced had therefore no jurisdiction to entertain the action or pronounce the judgment, and that it has no validity, and he further alleges that in any case there was no jurisdiction in that Court to give the plaintiff a lien for the amount of the judgment on his lands in Ontario : he also alleges that the judgment is not a final judgment.

On these issues the case went down for trial.

Judgment.

Meredith,
C.J.

At the trial the plaintiff put in as her evidence an exemplification of the record of the judgment sued on, by which it appears that it was pronounced in an action brought by the now defendant against the plaintiff for a divorce *a vinculo*, on the grounds of adultery and cruelty on the part of the wife; that the issue as to the alleged adultery was tried by a jury and resulted in a verdict for the wife; that the issue as to the cruelty charged was tried by the Court and the Judge thereof had made findings therein which were filed, wherein judgment was directed to be entered as thereafter adjudged and the record after a recital of these matters proceeds as follows:—

Now, on motion of Kelly & Kelly, attorneys for the plaintiff, it is adjudged:

1. That the bonds of matrimony hereunto existing between the plaintiff, John Wilson Swaizie and the defendant Alice C. Swaizie be, and the same are, wholly dissolved.

2. That the plaintiff John Wilson Swaizie pay to the defendant Alice C. Swaizie the sum of eight hundred dollars as a full and final division and distribution of the estate both real and personal of the plaintiff, in favour of the defendant, and in full and in lieu of alimony and of all taxable costs and attorney's fees in this action, except as to those heretofore allowed and paid by the plaintiff, and judgment is hereby awarded against the plaintiff John Wilson Swaizie, and in favour of the defendant Alice C. Swaizie, for the sum of eight hundred dollars.

That upon the neglect or refusal to make payment of the amount hereby adjudged to the defendant, that the defendant upon filing an affidavit shewing such failure or refusal may apply to the Court for an order for the enforcement of the same in such manner as to the Court may seem proper.

3. That the care and custody of the infant child of the parties, Emma Swaizie, be and is hereby awarded to the defendant Alice C. Swaizie, with leave to the plaintiff,

Judgment. John Wilson Swaizie, to have full and free access to see
Meredith, and visit said child with reasonable frequency and at
C.J. reasonable times and places.

There was no dispute at the trial as to the identity of the parties, and the plaintiff rested her case on proof of the judgment.

The defendant was the only witness called for the defence.

Briefly summarized his evidence was that he left the county of Welland where he and his wife resided and went to Milwaukee, where they lived for about six years ; that the action was brought while he was living there ; that he had never become a citizen of the United States ; that his residence in Wisconsin was not *animo manendi* and that he had not in the action testified or made an affidavit that he was a resident of or domiciled in that State.

My brother Robertson reserved his judgment and it was delivered on the 27th of June, 1899, and the reasons for dismissing the action appear in the report of the case 31 O. R. 81.

On the argument before us Mr. German abandoned the claim for a declaration of the lien and charge claimed, and indeed the claim to it appears to have been based on a misapprehension of the terms of the judgment, which does not profess to give any such lien or charge to the wife.

Mr. Snow, for the defendant, contended that the only Court having jurisdiction to pronounce a judgment or decree of divorce *a vinculo*, is that of the State within which the parties are domiciled at the time the proceedings are commenced ; and that upon the evidence it was shewn that the defendant was domiciled in Ontario and not in Wisconsin when he began his proceedings there, and that, that being so, the judgment as far as its extra territorial operation is concerned, must be treated by the Courts of this country as having no validity. He also contended that inasmuch as he argued the judgment

assumed to divide the lands of the defendant in Ontario between him and his wife and to award the \$800 to the wife as her share of his property, including the Ontario lands, it was invalid on that ground also, because as he urged, the Court had no jurisdiction as to lands in this Province.

Judgment.
Meredith,
C.J.

My learned brother, as I gather from the report of his judgment, gave effect to the latter of these objections and held also, that as the wife could not have recovered alimony in the Courts of this Province she could not recover on the judgment when it became apparent from the record that her cause of action was one which, according to the law of this country, could not be maintained in our Courts.

No evidence, as appears from what I said was given as to the foreign law.

I have, however, ascertained, though it may be doubtful whether I can take judicial notice of the fact, that by the statute law of Wisconsin, the Superior Court of Milwaukee county has jurisdiction to pronounce a decree of divorce *a vinculo*, where the person applying for it is, and has been for a prescribed period a resident of the State and proves the fact of his residence to the satisfaction of the Court: Sanborn & Berrymann's Annotated Statutes of Wisconsin, sec. 2359, and Rules of Court, p. 1363.

It also appears from the same statute that a divorce *a vinculo*, may be granted for among other causes, that for which according to the record, the judgment in question was pronounced: section 2356; and where such a divorce is granted for any cause other than adultery committed by the wife the Court may further adjudge to the wife such alimony out of the estate of her husband, for her support and maintenance, and such allowance for the support, maintenance and education of the minor children committed to her care as it shall deem just and reasonable; or the Court may divide and distribute the estate, both real and personal, of the husband, and so much of the estate of the wife as shall have been derived from the

Judgment. husband, between the parties, and divest and transfer the
Meredith, title of any thereof accordingly, having always due regard
O.J. * * (section 2364).

It may perhaps be sufficient to hold, as I think we are warranted in doing, that the defendant has by his conduct precluded himself from objecting to the jurisdiction of the Wisconsin Court to pronounce the judgment sued on.

The English Courts, at all events for the purpose of the exercise by them of jurisdiction, hold that a party may be so precluded, and the rule to be deduced from the cases is stated by Mr. Dicey in his *Conflict of Laws*, p. 223, Rule 42; and accordingly in *Zycklinski v. Zycklinski* (1862), 2 Sw. & T. 420, it was held by the Judge Ordinary that the respondent by appearing absolutely had precluded himself from raising an objection to the jurisdiction of the Court to entertain the proceeding against him, which was a petition by his wife for a divorce *a vinculo*, on the ground that he was not domiciled in England: this case is referred to by Mr. Dicey, at p. 276, as establishing the proposition stated by him as an exception to his Rule 49, that "The Court has jurisdiction to entertain proceedings for the dissolution of a marriage between parties who are not domiciled in England at the time of the proceedings for divorce where the respondent has appeared absolutely and not under protest, and thereby submitted to the jurisdiction of the Court."

If a respondent may be so precluded in an English Court, it seems to me that *a fortiori* a plaintiff who has instituted the proceedings in a foreign Court must be taken to have submitted to its jurisdiction and to have precluded himself from setting up the want of jurisdiction of that Court to make any such decree or pronounce any such judgment, as according to the law of the State by which the Court was constituted, it had jurisdiction to pronounce.

I should be content to dispose of this branch of the case on this ground alone, but that, with what may seem some inconsistency, English Courts sometimes assert a jurisdiction in themselves which they deny the right of a foreign

tribunal to exercise in like circumstances, and because it may be, that though the principle which I am discussing is properly applicable to actions in which private interests only are involved, it may be decided when that question arises, that it does extend to proceedings taken to dissolve a marriage on the ground that the latter may affect the interests of the State in which the parties are domiciled; and in view of the modification which seems to have taken place in recent times in the opinions of English Judges as to the true test for determining the competency of a tribunal to dissolve a marriage, the rule applied in the *Zycklinski* case may not be followed or at all events applied to the judgments of foreign tribunals.

Judgment.
Meredith,
C.J.

If, however, that be not so—and if the proper conclusion on the material before us be that the defendant was not at the time he began the proceedings for divorce, domiciled in Wisconsin—it would follow that in as far at all events as the Court whose judgment is in question assumed to dissolve the marriage of the parties, its judgment is not entitled to recognition as an effective judgment in this Province, because according to the rules of international law, the only Court having jurisdiction to pronounce a decree of divorce *a vinculo*, which ought to be recognized by the tribunals of other countries, is that of the country in which the parties are domiciled at the commencement of the proceedings.

The law was authoritatively and finally, as far as the Courts of this Province are concerned, so laid down by the Judicial Committee of the Privy Council in *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

That case is referred to by Sir John Gorell Barnes in *Armytage v. Armytage*, [1898] P. 178, as practically overruling *Niboyet v. Niboyet* (1878), 4 P. D. 1, in which a majority of the Court of Appeal (Brett, M. R., dissenting) held that residence not amounting to domicile or as it is called in some of the cases “matrimonial domicile” may be sufficient to give an English Court jurisdiction to pronounce a decree of divorce *a vinculo*; and he says, at p. 185:—

Judgment.

Meredith,
C.J.

"It may now be taken as settled that this Court has no jurisdiction to entertain proceedings for the dissolution of the marriage of parties not domiciled in this country at the commencement of the proceedings."

Then is it shewn that the Wisconsin Court had not jurisdiction to pronounce the decree of divorce which it assumes to grant? I think not. In the absence of anything appearing on the face of the proceedings to shew want of jurisdiction, the production of the record was *prima facie* evidence entitling the plaintiff to recover—the presumption in favour of the judgment may no doubt be rebutted; but to rebut it, clear proof of the facts necessary to be established to shew the want of jurisdiction must be adduced, and the defendant has not in my opinion adduced such evidence.

It is true that the defendant testified that he was not domiciled in Wisconsin at any time, but as I have said the Courts of that State do not assume to exercise the jurisdiction in question, unless the plaintiff at the commencement of the proceedings is a resident of the State, and in accordance with correct principles of interpretation to be applied to municipal laws conferring jurisdiction to grant decrees of divorce and which Mr. Bishop says is applied in most of the States of the American Union (Bishop on Marriage and Divorces, 6th ed., vol. 2, par. 114, 124a), it is held by the Courts of Wisconsin that the residence required by its laws to give jurisdiction is residence actual and *bonâ fide, animo manendi* and therefore domicile in the sense in which according to the rules of international law, domicile is necessary to give jurisdiction: *Dutcher v. Dutcher* (1876), 39 Wis., at p. 658.

Again it must be presumed, I think, in the absence of clear and satisfactory evidence to the contrary, that it was proved to the satisfaction of the Superior Court of Milwaukee county, that the plaintiff at the commencement of the proceedings in that Court was in the sense I have mentioned resident in Wisconsin: see *Scott v. Her Majesty's Attorney-General* (1886), 11 P. D. 128: and having regard

to the fact that he had resided there for six years and the other circumstances of the case, that presumption is not in my opinion displaced by his testimony at the trial given for the purpose of getting rid of the liability which was imposed upon him by the decree of a Court to which he appealed to dissolve his marriage and which he knew, or must be taken to have known, had no jurisdiction to entertain the proceedings unless he was at the commencement of them domiciled in the State of Wisconsin.

I am therefore of the opinion that the defendant has not successfully impeached the judgment on the main ground upon which it was attacked, and it follows that the adjudication as to the payment of the \$800 must be recognized as a valid one, unless the other objection to which I have referred, is entitled to prevail and I think it is not; for I see no reason why the judgment is not to be treated as one for the recovery of \$800 simply—at most I think the record shews that the amount adjudged to be paid by the defendant to the plaintiff was the sum which upon the dissolution of the marriage the defendant ought to pay to the plaintiff having regard to the value of the property owned by him; nor do I see why the fact that that sum was arrived at upon a consideration of the value of lands in Ontario should require us to treat the judgment as if it were one providing in terms for the division in specie of the Ontario lands: it does not so provide and there seems to me no more reason for treating it as one dealing directly with lands in Ontario than there would have been if the allowance to the wife had been a sum payable as alimony simply and it had appeared that the amount had been fixed on a consideration of what the entire income of the husband was including his income from lands in Ontario.

I have assumed for the purpose of the argument that a provision for the division in specie of the husband's property, including his Ontario lands, would be treated as invalid by the Courts of this Province, but I do not think it would be so treated, the judgment being pronounced in a proceeding instituted by the husband, which the Court

Judgment.

**Meredith,
C.J.**

Judgment.
Meredith,
C.J.

had jurisdiction to entertain, and in which according to the laws of that State, it was competent for the Court when dissolving the marriage to direct that such a division of the husband's property should be made. The record shews that the judgment was pronounced on the motion of the defendant's attorney and it would be anomalous if having obtained his divorce subject to that condition, he should be entitled to be heard now to say that the Court had no power to deal with his lands in Ontario. He in effect, I think, by his act submitted to the Court doing so if in the exercise of its discretion it deemed it proper to direct such a division to be made.

It is unnecessary to consider what the result would have been had my conclusion been that the Wisconsin Court had no jurisdiction to entertain the proceedings for divorce and whether that part of the judgment which assumes to dissolve the marriage in that case, not being entitled to recognition as a valid adjudication beyond the limits of Wisconsin, the other provisions of the judgment must fall or might not be upheld, as not dealing with the status of the parties, but only with rights of property or with matters as to which something less than domicile is sufficient to give jurisdiction as in proceedings in England for the restitution of conjugal rights or for divorce *a mensa et thoro* or there and here for alimony according to the opinion of Lord Watson in the *Le Mesurier* case and the judgment of the Court in the *Armstrong* case.

In support of the objection that the judgment is not a final one, reliance was placed on the provision for the wife applying to the Court to enforce payment of the amount awarded, but the objection is in my opinion unfounded. Tried by the tests to be applied in determining the question of finality according to the adjudged cases which are cited by Mr. Dicey, at p. 417 *et seq.*, where the result of them is stated—the judgment in question is a final one.

The result is that in my opinion the plaintiff was entitled to recover, and the appeal should therefore be allowed with costs and the judgment appealed from

reversed, and instead a judgment should be entered for the plaintiff for eight hundred dollars with interest and costs.

Judgment.
Meredith,
C.J.

If there be, or be supposed to be, any difficulty in thus disposing of the case, owing to the foreign law not having been proved, the plaintiff should be given leave to supply proof of it.

ROSE and MACMAHON, JJ., concurred.

G. A. B.

RE ALLEN AND NASMITH.

Landlord and Tenant—Renewable Lease—Buildings Erected by Tenant—Absence of Covenant as to—Arbitration—Rent on Renewal—"Ground Rent."

A renewal lease is a continuation of the old lease and if rent for buildings erected by the tenant is not provided for under the first lease neither should it be under the extension in the absence of express provision.

An application to refer back an award in a case where a tenant had a renewable lease and had during the original term erected buildings on the premises, there being no provision in the lease as to buildings erected by the tenant, and where the arbitrators in arriving at the rent for the renewed term had fixed a "ground rent" without taking the buildings into consideration, was dismissed with costs.

THIS was a motion for an order to remit back an award to arbitrators for reconsideration. **Statement.**

A lot of land in the city of Toronto had been leased in the year 1878 by the owner, John Platt, to James Dunn, by a lease made in pursuance of the Act respecting short forms of leases, for a period of twenty-one years, and which contained a covenant for renewal as follows:

"The said lessor covenants with the said lessee for quiet enjoyment and that he the lessor shall and will at the costs and charges of the lessee * * and if requested by him so to do * * grant another lease to him * * for the further term of twenty-one years * * at and under such rent as may then be agreed on or in the event of their

Statement. not being able to agree thereon (then followed a provision for arbitration) such renewed lease to contain the like covenants and provisions as are in these presents contained including a like covenant for renewal as the present covenant in the same or any other renewal lease."

No provision was made as to any buildings which might be erected on the lot.

The lessor died during the currency of the lease leaving Thomas Allen his executor: and Mungo Nasmith became the assignee of the lessee. When the lease expired the parties interested not being able to agree upon the rent, it was referred to three arbitrators, who made their award, fixing the rent without taking into consideration certain brick buildings which had been erected by the tenant, and found adjudged and determined "that the sum of

* * is the amount proper to be paid as the yearly ground rent for the said demised premises for such second term of twenty-one years."

The motion was argued in the Weekly Court on January 16th, 1900, before BOYD, C.

Aylesworth, Q. C., for the motion. The arbitrators have not complied with the submission which directed them "to award and determine the annual rent to be paid

* * for a further lease of the said demised premises." They have merely fixed the rent of the ground without taking into consideration the buildings on the premises, which being affixed to the freehold became part of the freehold. The lease by its terms is really a lease in perpetuity and contained covenants to repair; and that the lessor may enter and view the state of repair; that the said lessee will repair according to notice, and that he will leave the premises in good repair, which under the statute then in force, R. S. O., 1877, was that the lessee shall repair the "premises with the appurtenances * * and all fixtures and things thereto belonging, or which at any time during the said term shall be erected

or made." Ch. 103, schedule B. 3; and the lessor had the right "to enter the said demised premises to examine the condition thereof:" schedule B. 6; and at the expiration of the term, that the lessee will surrender and yield up "the said premises hereby demised * * together with all buildings, erections and fixtures thereon:" schedule B. 8. If the buildings belonged to the lessee there would be no object in providing that he should repair his own property.

A. J. Russell Snow, contra. The lease is an old form of statutory lease not appropriate to what it was intended for, containing covenants "to keep up fences" and "not to cut down timber" in respect to a city lot. The lessee should not pay rent on his own buildings. If he was obliged to do so there would be no object in taking a renewal at the full rental of land and buildings. The only way he can obtain any return for his buildings is to take advantage of his clause for the renewal of the lease at a ground rent, otherwise his buildings would go to the landlord and be lost to him, but this has not happened yet. The "demised premises" were the premises as they existed when the lease was first made. This is virtually an appeal from the award; and the submission provided that there should be no appeal from the valuation or award of the arbitrators, who were judges of both the law and facts, and besides, the award was prepared with the privity of the applicant. I refer to *The London Dock Co. v. The Trustees of the Poor of the Parish of Shadwell* (1862), 32 L. J. Q. B. 30; *Hodgkinson v. Fernie* (1857), 3 C. B. N. S. 189; *Green v. The Citizens' Ins. Co.* (1890), 18 S. C. R. 338; *McRae v. Lemay* (1890), 18 S. C. R. 280.

Aylesworth, in reply.

January 23 1900. BOYD, C.:—

The original lease is for twenty-one years from November, 1878, at a rental of \$185.50. It describes the boundaries of the lot, and at the end of the metes and bounds

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Boyd, C.

were these words: "together with all houses and appurtenances thereto belonging." There was then one small outhouse or shed on the place which is still there in great decay.

But during the term was erected a substantial brick building for which, however, no extra rent was paid or payable during the twenty-one years. The lease is expressed to be under the statutory form of short leases, and has printed in it the covenants "to repair," and "to repair according to notice," and "to leave the premises in good repair," etc.

There is next a written covenant by the lessor to grant at the lessee's request "another lease" for the term of twenty-one years under such rent as may be agreed on, or as shall be thought just and reasonable (by means of arbitration). The renewed lease to contain like covenants with the first, including a like covenant for renewal.

The arbitrators appointed have unanimously fixed the rent by way of ground rent, excluding any rent or payment for rent based upon the value of the brick building placed on the ground during the first term. There is no provision made respecting the buildings which might be put up by the tenant as to valuing them at the end of the term if no renewal, so that no doubt they would go to the landlord, if the tenant failed to renew.

The arbitrators have taken the equitable view that the tenant who put up the house should not pay rent in respect of it, but should pay only upon the premises as demised, *i.e.*, the land alone. They had power to do what was just and reasonable by the very terms of the lease, and I prefer to let their award stand rather than to apply the technical rules of law as to the building becoming part of the land. No cases were cited, and I suppose none exist. I do not think the printed words of statutory covenants, many of which as to fences and timber, are inapt, should be read in their extended form, so as to outweigh the import of the written parts of the lease, which rather favour the tenant.

The renewal lease "is a continuation of the old lease," and if rent for the building put up by the tenant was not provided for under the first lease, neither should it be under the extension in the absence of express provision: see *Rawe v. Chichester* (1773), 2 Amb., at p. 719. Judgment.
Boyd, C.

The provision for indefinite renewal found in this lease so extends the stability of the tenant's interest as to induce permanent improvement in the way of building on his part. The American law is that the tenant under perpetual renewal has the right to take down and build up, alter, remodel and reconstruct at his own pleasure, so long as he does not impair the landlord's security for the rent. Practically, he is regarded as the owner of the house so long as he elects to hold by renewal of the lease: *Crowe v. Wilson* (1886), 57 Am. Rep. 343.

This position would of course be modified by the covenants as to repair and the like in this case, but there is a great substratum of truth in the position that the house erected by the tenant is rather his than the landlord's, pending the term. Only in some such way of adjusting the rent as was here done upon the renewal can the tenant be reimbursed for the improvements he makes: *Hyde v. Skinner* (1723), 2 P. Wms. 196; *Pilling v. Armitage* (1806), 12 Ves. 78.

The strong point urged is that the award is not complete because the arbitrators speak of the "ground rent." Their use of this term is not inapt to the situation. Cranworth, L. C., in *Bartlett v. Salmon* (1885), 6 D. M. & G. at p. 41, said: "The term ground rent is well understood, and has a definite meaning; it is the sum paid * * for the use of land to build on, and is therefore much under what it lets for when it has been built on."

The rent at the start was in fact "ground rent," and that should be the measure of the rent on the renewal. It was ground that was leased, and it was only ground that was to be valued.

I dismiss the application with costs.

G. A. B.

THE ATTORNEY GENERAL OF THE PROVINCE OF ONTARIO
V.
NEWMAN ET AL.

*Revenue—Succession Duty—R. S. O. ch. 24—Bank Deposit Receipts—
Foreign Domicile.*

Succession duty is payable upon deposit receipts issued by banks in this Province, payable here to a person whose domicile was in a foreign country at the time of his death.

Statement. THIS was an action brought by the Attorney General of the Province of Ontario, against R. Adlington Newman and Oscar E. Fleiming the personal representatives in the State of Michigan, U. S., and Province of Ontario, respectively, of one Daniel Scotten deceased, who was in his lifetime a resident of the said State, and who had at the time of his death moneys deposited in various banks in Ontario, some of whose head offices were in the Province. The claim in the action was to have it declared that the moneys so deposited were liable to succession duty under R. S. O. ch. 24.

The action was tried at Toronto, on November 20th, 1899, before BOYD, C., without a jury.

Shepley, Q. C., Alfred Macdougall (Solicitor to the Treasury), and *W. E. Middleton*, for the plaintiff. For the purposes of this legislation the Province of Ontario is the *situs* of this particular money or property. The power to tax is an incident of the protection afforded to property at the hands of the law. From this it follows that for the purposes of taxation, property has a *situs* distinct from the domicile of the owner, and that the power to tax is co-extensive with the ability of the state to enforce the tax or its own law upon the subject of the tax. The jurisdiction of the Provincial Legislature arises under the British North America Act, 1867, 31-32 Vict. ch. 3, sec. 93, sub-secs. 2, 13. The deposits in question are simple contract debts and their locality for the purpose of administration is where they are *bona notabilia*, or the resi-

dence of the debtor: *Attorney General v. Bouwens* (1838), 4 M. & W. 171, at p. 192; *Commissioner of Stamps v. Hope*, [1891] A.C. 476, at p. 481. For the purposes of the Act the maxim *mobilia sequuntur personam* does not apply to these deposits. Title to them could only be conferred by the grant of probate in Ontario: *Blackwood v. The Queen* (1882), 8 App. Cas. 82, at p. 79; *Wallace v. Attorney General* (1865), L.R. 1 Ch. *per* Lord Cranworth, at p. 9; *Attorney General v. Lord Sudeley*, [1895] 2 Q.B. 526. The *situs* of the property being here and the Legislature having the power to tax, it makes no difference whether the owner was a resident of the Province or not: sec. 4, sub-sec. (a). The fund was receiving the protection of our laws: *The Calcutta Jute Mills Co. v. Nicholson* (1876), 1 Ex. D., at pp. 449, 450. Although this property is in a sense intangible and incorporeal it is separate from the person of its owner for the purpose of taxation: *Tappan v. Merchants National Bank* (1873), 19 Wallace (U.S.R.) 490. The line of English cases culminating in *Thompson v. Her Majesty's Advocate General* (1842), 12 Cl. & F. 1, were all decided on statutes which did not provide as our statute does, that the tax imposed should be irrespective of domicile; and so the Courts held that the intention of the Legislature must have been to confine the legislation to cases where the persons whose property was taxed were domiciled in England: Dos Passos on Inheritance Tax Law, 2nd ed., par. 47, p. 159 *et seq*; Dicey's Conflict of Laws, 1896, ed. 318. The locality of the debt being the residence of the debtor and the banks and the branches holding the deposits being in Ontario, the Ontario administrator is clothed with title to demand and collect them: *Irwin v. Bank of Montreal* (1876), 38 U.C.R. 375. The branch office of the bank where the money was deposited must be regarded as its place of residence so far as these deposits are concerned: *County of Wentworth v. Smith* (1893), 15 P.R. 372. The branch of a bank is for many purposes regarded as a distinct entity and if necessary may be so regarded here: *Woodland v. Fear* (1857), 7 E. & B. 519; *Clode v. Bayley*

Argument.

(1843), 12 M. & W. 51; *Prince v. Oriental Bank Corporation* (1878), 3 App. Cas. 325. Here there has been an election by the administrator to treat these debts as Ontario assets: *Irwin v. Bank of Montreal, supra*.

Aylesworth, Q.C., and J. H. Rodd, for the defendants. Under sec. 4, sub sec. (a) only *certain* property, not *all* property all over the world, is liable to this tax or duty. The words are "all property *situate within this Province*."—that applies to visible tangible property which can be located wherever it may happen to be, but no local *situs* can be attributed to this property except by fiction of law. It is simply a debt, not even a bailment of a quantity of bullion, but a creditor's right to receive; a debtor's obligation to pay. It is not property in the hands of the debtor; it is no estate in him, but an obligation. It is an asset to the creditor and so it is property in his hands. The cases cited connecting the property with the debtor were cases of probate duty. There is a wide distinction between probate duty and succession duty. Probate duty is occasioned by application being made to the courts of the country where the debtor is, to authenticate a will or clothe the personal representative with authority to collect and administer an estate; and the locality of the debtor will determine the *situs* of the debt or obligation to pay, as there the debt is to be paid. Succession duty, on the contrary, applies to a legacy under a will or succession of property in case of intestacy: both of which pass, not by virtue of the law of the country where the beneficiary resides or where the property is situate, but of the country where the testator or intestate resided. Property may have one *situs* for succession duty and another for probate duty. The probate duty depends on the gross value of the estate and is taken out of the body of the estate. The succession duty depends on who is inheriting and is taken out of the beneficiaries' interest. In cases of choses in action regard is had to the domicile of the creditor: *Williams on Executors*, 9th ed., p. 1496, and *In re Bruce* (1832), 2 C. & J. 436, referred to there: *Thompson v. Her Majesty's Advocate General* (1845), 12 Cl.

Argument.

& F., at pp. 17, 21; *Re Estate of Ewin* (1830), 1 C. & J. 151. It might not even be necessary to take out letters of administration in Ontario to collect the moneys represented by these deposit receipts: *Hard v. Pulmer* (1860), 20 U. C. R. 208 and they might have been equitably assigned so as to pass the property represented by them. The deposit receipts might be treated as specialties and if so they follow the *situs* of the documents which was in the States: *Bank of Montreal v. Little* (1870), 17 Gr. 313 and in appeal p. 685, *per* Mowat, V.-C., at p. 690. The debtor should seek his creditor and make payment. This property could not be assessed here in Mr. Scotten's lifetime under the Assessment Act although the language used is similar: R. S. O. ch. 224, sec. 38. We also refer to *Wallace v. The Attorney General* (1865), L. R. 1 Ch. 1; *Blackwood v. The Queen* (1881), 7 Vict. L. R. 400, (1882), 8 App. Cas. 82; *Re The Will of Christopher Neville Bagot* (1881), 7 Vict. L. R. (I. P. & M. Cases) 106; *Williams on Executors*, 9th ed., 542, 546; *Henty v. The Queen*, [1896] A. C. 567; *Mickle v. Douglas* (1874), 35 U. C. R. 126, in appeal 37 U. C. R. 51, at pp. 60, 61; *Harding v. The Commissioner of Stamps for Queensland*, [1898] A. C. 769; *Story on Conflict of Laws*, 8th ed. 507, 559; *Bouvier's Law Dictionary*, vol. 2, pp. 1094, 1095 under the word "Tax"; *Burroughs' Law of Taxation*, pp. 41, 42; *Re The State Tax on Foreign-held Bonds* (1872), 15 Wallace (U. S. R.), at pp. 319, 320; *Graham v. Township of St. Joseph* (1888), 67 Mich. 652; *Curtis v. The Township of Richland* (1885), 56 Mich. 473; *Re The Estate of Henry Bronson* (1896), 150 N. Y. 1; *Re The Estate of Augustus Whiting* (1896), *ib.* 27; *Re The Estate of John F. Houdayer* (1896), *ib.* 37; *Re Central Bank, Morton's and Block's Claims* (1889), 17 O. R. 574; *In re Griffin, Griffin v. Griffin*, *Weekly Notes* (1898), 174; *Scholey v. Rew* (1874), 23 Wallace (U. S. R.) at p. 343; *Re James* (1894), 144 N. Y. 6; *Re Estate of James T. Swift* (1893), 137 N. Y. at p. 85; *The People ex rel Hoyt v. The Commissioners of Taxes* (1861), 23 N. Y., at p. 235; *Coleman's Estate* (1893), 155 Penn., at p. 234.

Argument. *Shepley*, in reply. The answer to the main argument advanced for the defendants, viz : that this is a succession and not a probate duty is furnished by the judgment in *Blackwood v. The Queen* (1882), 8 App. Cas. 82 : the statute under consideration there did not differ from our statute now under consideration. This property would have been assessable under our Assessment Act if it had not been for the specific exception made by the words of that Act itself. I refer also to Cooley on Taxation, 2nd ed., at pp. 23, 222 ; *Re Estate of Worthington Romaine* (1891), 127 N. Y. at p. 86 ; Hanson's Death Duties, 4th ed., 40.

December 18th, 1899. BOYD, C. :—

The claim made is by the Crown for the payment of succession duties in respect of part of the personal estate of the late Daniel Scotten of Detroit—a naturalized American citizen—domiciled at his death in the State of Michigan, who had deposited some \$900,000 in the offices of Canadian banks at London and Windsor. These deposits stood in his name, and were part of his personal estate at the date of his death, intestate.

I think the statutes as to the payment of succession duties and as to surrogate courts, R. S. O. ch. 24, and ch. 59, may fairly be read together as in *pari materid*. Both relate to the administration of property situate in Ontario, forming assets to be administered by the provincial officers and courts irrespective of the domicile of the deceased. The local site of the property whether personalty or realty is that which gives jurisdiction to the Legislature and the courts of Ontario in dealing with the assets of the deceased. The enquiry here is with regard to movable or personal "property," as defined by the succession duties Act, wherein is included personal property of every description capable of passing by will or intestacy at the time of death.

The payment of duties extends to all property situate within this Province, whether the deceased owner was

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Boyd, C.

domiciled in Ontario at the time of his death or not. The payment of the tax is charged upon the property and made payable by the administrator before being delivered by him to the beneficiary next of kin; secs. 4 (1a) 12 (1) and 14, and with power of sale to raise the amount as fully as might be done for the payment of the intestate's debts (sec. 15). These, among other sections, shew that the distinctive feature of the succession duty legislation is to impose the payment of the duty as a primary charge upon and out of the corpus of the estate by the personal representative before the assets are distributed.

That being the principle underlying the legislation and manifest upon the face of the Act, the Court is not called upon to discuss the policy of the statute, but simply to ascertain its requirements, having regard to the authorities applicable to the situation: *Montreal Gas Co. v. Cadieux*, [1899] A.C. at p. 593.

It is plain that the statute contemplates a site and locality being given to all kinds of personal property, and that the domicile of the deceased owner is not to be taken into account. Hence is displaced at the very outset any application of the maxim *mobilia sequuntur personam*, the expression at most of a convenient legal fiction.

As to certain personal property, cattle and tangible chattels, and the like, there is an actual local position: as to other kinds, such as debts and choses in action, the property is intangible, and though not possessing in strictness locality, yet a legal *situs* is attributed to it (and again by a more substantial legal fiction) by connecting it in different ways with a particular place or country.

As to the property now in dispute, it consists of large deposits of money made by the owner in his lifetime in the offices of Ontario banks at London and Windsor for safe keeping and interest-yielding purposes—and for these deposits the banks agree to account to him on the production of the deposit receipts—which are not transferable, *i.e.*, negotiable.

The money represented by the receipt has to be received

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Boyd, C.

by the personal representative of the testator in the country of deposit, and this can only be done by a properly appointed or properly constituted local administrator. The general administrator holding authority under the Courts of the deceased's domicile has no *locus standi* as such in the Courts of Ontario, to sue or give a discharge for these debts. These transactions are by their character localized in this Province—the money was brought here and kept here for the non-resident owner under the protection of the laws of Ontario. The banks are all *quoad* these deposits resident in this Province, and in this *forum* is recovery to be had of the money by the local administrator.

I cite from the judgment of Lord Field in *Commissioner of Stamps v. Hope*, [1891] A.C., at p. 481: "A debt *per se*, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence; but it has been long established in the Courts of the country, and is a well settled rule governing all questions as to which Court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be *bona notabilia* within the area of the local jurisdiction within which he resided."

This is the rule also as to the debts manifested by these deposit receipts which were only evidences of the transaction: *Irwin v. Bank of Montreal* (1876), 38 U.C.R., at p. 392; *Pritchard v. Standard Life Ass. Co.* (1884), 7 O.R. 188; *The New York Breweries Co., Ltd., v. The Attorney-General*, [1899] A.C. 62; *Attorney-General v. Bouwens* (1838), 4 M. & W., at pp. 191, 192 and *Little v. Bank of Montreal* (1870), 17 Gr. 313.

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The result is agreeable to American authorities of highest repute: see *Pullman's Palace Car Co. v. Pennsylvania* (1890), 141 U.S.R., at p. 22, where it is said by the Court "No general principles of law are better settled, or more fundamental, than that the legislative power of every state extends to all property within its borders, * * . The old rule, expressed in the maxim *mobilis sequuntur personam*, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, *

* . In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. * * * * *

Personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax." See also *Wyman v. Halsted* (1883), 109 U.S.R. 654, localizing simple contract debts at the residence of the debtor; and *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34, and (1885), 10 App. Cas., at p. 514, developing the doctrine of ancillary administration applicable to personal property in a country other than the domicile of the deceased.

The judgment should be for the Crown with costs.

G. A. B.

MITCHELL

V.

THE CORPORATION OF THE TOWN OF PEMBROKE.

Police Magistrate—"Police Office"—Municipal Corporation—Accommodation—Stationery.

The police magistrate of a town cannot require the municipal corporation to provide facilities for the transaction of business not strictly appertaining to his office of police magistrate, such as business relating to an adjoining county of which he is a justice of the peace, nor is he entitled to a private office in addition to a public one. It is sufficient if a suitable room or chamber for a police office is provided in any building belonging to the municipality (in this case the council chamber) although by doing so the hours for the transaction of police business may be limited.

A municipal corporation is liable to a police magistrate for a claim for stationery although extending beyond a year.

Statement.

This was an action brought by the police magistrate of the town of Pembroke to compel the corporation of that town to furnish him with a police office, properly furnished, in which to transact his business as such police magistrate and to supply the necessary stationery therefor, and to recover certain moneys alleged to have been disbursed by him in previous years for rent, fuel, stationery, etc.

The action was tried at Pembroke on December 13th and 14th, 1899, before BOYD, C., without a jury.

It appeared that the plaintiff was a justice of the peace for the county of Renfrew, of which Pembroke was the county town, as well as police magistrate of that town, and was in the habit of transacting county, as well as town, business, and that the defendants had given him the use of the council chamber in the town hall, in which to transact his business as police magistrate, but had limited the hours in the day during which he might use it and had imposed a charge upon him whenever he transacted there business arising outside of the town limits.

J. R. Metcalf, appeared for the plaintiff, and contended

that the corporation were bound to provide the plaintiff with a proper police office in which to transact his business, properly furnished and supplied with the necessary stationery; that on the evidence the council chamber was not a fit and proper place for a police office; that the plaintiff was entitled to use the town hall, if he so desired, for the hearing of cases therein, and that the defendants had no right to limit the hours during which he might use it or to impose any charge by way of fee or rent when it was used for other than town business and that he was entitled to use it for the disposal of any business brought before him either as a police magistrate or a justice of the peace, and that he was entitled to a mandamus, and cited "The Consolidated Municipal Act, 1892," sec. 432; 48 Vict. ch. 17, sec. 4 (O.); R. S. O. 1887 ch. 72, sec. 19; R. S. O. ch. 87, sec. 28; 59 Vict. ch. 51, sec. 35 (O.); *Newsome v. County of Oxford* (1895), 28 O. R. 442; *Lees v. The Corporation of the County of Carleton* (1873), 33 U. C. R. 409; *Knox v. Arms* (1859), 22 Ill. 175; *McClaghry v. Board of Supervisors of Hancock Co.* (1868), 46 Ill. 356; *Commissioners Court of Pike Co. v. Goldthwaite* (1860), 35 Ala. 704; *Wright v. City of Philadelphia* (1879), 14 Phil. 170; Am. & Eng. Ency. of Law, 1st ed., vol. 19, p. 543; O. J. Act, R. S. O. ch. 51, sec. 58, sub-sec. 9; *Young v. Erie & Huron R. W. Co.* (1896), 27 O. R. 530; *Glossop v. Heston & Isleworth Local Board* (1879), 12 Ch. D., at p. 122; *McDonald v. McDonald* (1890), 17 A. R. 192; *Daley v. Napanee*.*

J. J. O'Meara, for the defendants contended that even if the defendants should furnish a police office the furnishing was limited, as furnishing was not originally contemplated by the Legislature; that all the police magistrate has to do is to attend and hear cases and dispose of business brought before him as in Court, and only such as he is bound to dispose of as police magistrate, as the clerk does all the preliminary and routine business; that he is only entitled

* *Per STREET, J.*, May 1, 1899. Not reported.—REP.

Argument. to stationery as a police magistrate and not as a justice of the peace for outside voluntary business ; that his laches in former years had lost his claim now, as his accounts should be claimed every year ; that the defendants had not acquiesced in any conduct of his in supplying himself and that he was not entitled to a mandamus when he had any other remedy, and cited "The Consolidated Municipal Act, 1883," sec. 433 ; 59 Vict. ch. 51, sec. 35 (O.) ; R. S. O. ch. 223, sec. 479, sub-sec. 2 and sec. 480 ; ch. 87, secs. 26-35 ; *Dark v. The Municipal Council of Huron and Bruce* (1858), 7 C. P. 378 ; *Coombs v. The Municipal Council of the County of Middlesex* (1858), 15 U. C. R. 367 ; *Justices of the District of Huron v. Huron District Council* (1849), 5 U. C. R. 574 ; *Ward v. The United Counties of Northumberland and Durham* (1862), 12 C. P. 54 ; *The Corporation of the Township of Pembroke v. The Canada Central R. W. Co.* (1882), 3 O. R. 503 ; *The Corporation of the Town of Peterborough v. Hatton* (1879), 30 C. P. 455 ; *Re Whitaker and Mason* (1889), 18 O. R. 63.

Metcalf, in reply.

December 21, 1899. BOYD, C. :—

In the development of municipal institutions in this Province, provision was first made for the systematic "policing" of villages, towns, and cities, by the general Act of 1849 (12 Vict. ch. 81). Section 69 enacts that "There shall be in * * towns a police office, at which it shall be the duty of the police magistrate for such town, or in his absence from sickness or other causes, or when there shall be no police magistrate for such town, then it shall be the duty of the mayor thereof to attend daily, or at such times and for such period as shall be necessary for the disposal of the business to be brought before him as a justice of the peace for such town : provided always, firstly, that no such attendance shall be required on Sunday, Christmas Day or Good Friday, or on any day appointed by proclamation for a public fast or thanks-

giving, unless in cases of urgent necessity ; and provided also, secondly, that it shall and may be lawful for any justice of the peace having jurisdiction within such town, at the request of the mayor thereof, to sit for such mayor at such police office, in every of which cases the required attendance of the said mayor at such police office shall be dispensed with."

Judgment
Boyd, C.

Other sections (e.g., 71 and 72) point out his duties as a justice and conservator of the peace : see *Regina v. Richardson* (1885), 8 O. R., at p. 657. Sec. 73, declares that the clerks of the town councils shall be clerks of the police offices of such towns, and perform the same duties and receive the same emoluments as now appertain to clerks of justices of the peace in Upper Canada, unless by act of the town councils of such town another officer be appointed for such purpose.

Section 81 confers power upon the town council to make by-laws "for establishing and regulating a police for such town" (from the context this would seem to include some kind of building).

By the Act township councils have power to erect and maintain town halls (section 31 (2)), and counties to erect and maintain shire halls (sections 36 and 41 (2)), and court houses. The town has the right to use the court house (section 68). Cities are authorized to erect city halls and court houses (section 107 (1)).

This early law was in force till 1858, when was passed the Act respecting the Municipal Institutions of Upper Canada, which practically brought the law into its present formal shape. Thus section 347 reads, "The council of every town and city shall establish therein a police office, and the police magistrate * * shall attend at such police office daily, or at such times and for such period as may be necessary for the disposal of the business brought before him as a justice of the peace," etc.: 22 Vict. ch. 99.

By this Act of 1858, sec. 242, towns were empowered to pass by-laws for obtaining land and for erecting and maintaining a hall and other houses and buildings required by the corporation.

Judgment.
Boyd, C.

Cities and towns might also provide for establishing, regulating and maintaining a police; but subject to the other provisions of the Act on that head: sec. 290, sub-sec. 7.

Both expressions "there shall be in each town a police office," and the council of every town "shall establish a police office," come to the same thing, *i.e.*, it is contemplated that there shall be some fixed, well-ascertained place, room or building, where local justice shall be administered, and where the magistrate shall be found at stated times, to meet complainants, to hear grievances, and to dispose of business brought before him as a justice of the peace.

The familiar phrase "police office" was somewhat of a novelty in 1849. It was borrowed from English legislation where it first appears in 1800, in the preamble to 39 & 40 Geo. III. ch. 87, "Whereas for the more effectual prevention of depredations * * in the River Thames, it may be expedient to establish * * near the said river a publick office of the nature of the several offices commonly called *police offices*" (instituted under 32 Geo. III. ch. 53).

Thereby was established a public office under the name of the Thames Police Office, where three justices of the peace were to sit and act for the hearing and determining of complaints of offences committed on the River Thames.

Here we find then, the first "police office" so expressly called and it is noteworthy that it was established as a "public office." There is also given besides other phraseology found in our statutes, *e.g.*, the magistrates are directed to attend at the said office during stated hours.

Not till 1829 did the name "police office" become naturalized in legislative expression, when by 10 Geo. IV. ch. 44, a new and more efficient system of police was established in the city of Westminster, and an office of police constituted, and it was enacted that a new police office should be there established: see preamble and sec. 1, and compare 42 Geo. III. ch. 76.

Before this police offices were described in the statutes as "public offices established" at such and such centres of

population and the intent was that there might be a due and regular attendance of fit and able magistrates at certain known places and at stated times: see 32 Geo. III. ch. 53 (1792) preamble.

The place of meeting for petty sessions or magistrate's courts was originally where it pleased the justices to sit in their own houses, at inns or elsewhere, and the place was often called "the justice room": see *Daubney v. Cooper* (1829), 10 B. & C. 237, and 5 M. & Ry. 314, but this was superseded after 1829 by "police office" (wherever the new system obtained). (Note: the Petty Sessions remained an ambulatory Court in England till 1879, when by the Summary Jurisdiction Act, sec. 20, it was required to meet at a stated place), to indicate the place for adjudication: see *Collier v. Hicks* (1831), 2 B. & Ad. 663.

These established "public offices" at various parishes as so called in 42 Geo. III. ch. 76, are continued under the name of "police offices" in 2 & 3 Vict. ch. 71, sec. 1 (1839). Section 12 of this Act 2 & 3 Vict. ch. 71 has suggested much of the phraseology of the first proviso of section 69 of our original Act, 12 Vict. ch. 81.

By the English Municipal Corporations Act of 1835 (5 & 6 Wm. IV. ch. 76), it is said that the council of every borough to which a separate commission of the peace has been granted shall be required to provide and furnish one or more fit and suitable office or offices to be called "the police office," or "offices" of the borough, for the purpose of transacting the business of the justices of the borough, and to pay such sums as may be necessary for providing, upholding and furnishing, and for the necessary expenses of such police office or offices: section 100.

This statute does not seem to have been regarded or followed in the framing of the Canadian enactments as to the police.

The provisions now in force which fall to be considered in this action are as follows:—

The council of every town and city shall establish therein a police office; and the police magistrate * * shall

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Boyd, C.

attend at such police office daily or at such times and for such period as may be necessary for the disposal of the business brought before him as a justice of the peace: R. S. O. ch. 223, sec. 479 (1).

The council shall from time to time provide all necessary and proper accommodation, fuel, light, stationery, and furniture for the police office, and for all offices connected therewith, *ib.*, sec. 479 (2). (This was first introduced in 1896 by 59 Vict. ch. 51, sec. 35.)

The clerk of the council of every city or town * * shall be the clerk of the police office thereof, and shall perform the same duties and receive the same emoluments as clerks of justices of the peace * * and such clerk shall be the officer of and under the police magistrate: *ib.*, sec. 480.

In like connection is to be read the provisions of R. S. O. ch. 87, sec. 35: "No police magistrate need act in any case arising outside of the limits of the city, town or place, for which he is police magistrate, unless he sees fit so to do," and section 38: "Except in cases of urgent necessity no attendance of the police magistrate shall be required at the police office on Sundays or other holidays," etc.

Also to be considered is ch. 87, sec. 28: "Every police magistrate shall, whenever he deems that there is occasion therefor, have a right to use any court room or town hall belonging to the county or to any municipality therein (which has no police magistrate of its own), for the hearing of cases brought before him: provided the magistrate * * shall not interfere with the ordinary use of the court rooms for the other courts, or with the use of the town hall for the purposes for which the same was built."

This last section provides (looking at the case now in controversy) that a police magistrate may occupy the town hall of any municipality (in the county) which has no police magistrate of its own. But the town of Pembroke is a municipality forming part of the county of Renfrew and has a police magistrate of its own—to wit—the plaintiff.

He has no right to occupy the town hall of Pembroke

under this section and no other has been pointed out conferring this as a privilege or a right. Nor has this point been thus held in *Daly v. Napanee*, for there the plaintiff was police magistrate of the county as well as of the town forming part of it, and so it is on the facts distinguishable.

Personally I am inclined to think that this section is to be construed with reference to its original 48 Vict. ch. 17, sec. 4 (O.); 50 Vict. ch. 11, sec. 5 (O.), and to be read as applying to every police magistrate for a county or union of counties or district or part of a district in which the Canada Temperance Act is in force.

It does not seem to have been rightly interpreted in what is said in *obiter* in *Regina v. Lee* (1887), 15 O. R., at p. 359, for in that case the defendant was police magistrate of Brant, exclusive of Brantford, and Brantford had a separate police magistrate of its own (see p. 357) so that the parenthesis would shut out the defendant from having a right to use the "court room" in the city.

I cannot doubt, looking at the history of legislation and the actual words used that the Legislature calls for only one public place or station in order to satisfy the statute that "a police office" shall be established. It is not needful that this be a separate building; the allocation of a suitable room or chamber in any building belonging to the municipality will suffice.

The fact that the town clerk is made the statutory clerk of the police office points to a situation in or near the building where town officers are congregated. Such a place is the town hall or the court house and it is customary to have some portion of these set apart for the purposes of the police court.

The evidence before me greatly preponderates as to the propriety and suitability of the site being at the town hall and in that part of it called "the council chamber." This is lighted and heated and furnished and has been so adjusted that it may reasonably suit the meetings of the reduced body of councillors as well as the daily session of the police magistrate.

Judgment.

Boyd, C.

Judgment.

Boyd, C.

It may be if the plaintiff chooses to dispense with his private office at his place of business and confine himself more strictly to the council chamber that he should be provided with a desk, a safe and a bookcase with lock and key. There is a safe or vault in connection with the town clerk's office and as he is made by law the clerk of the police magistrate that would be an appropriate place for the preservation of the more important documents. The town clerk is indeed the proper custodian of all papers connected with the police office: see *Regina v. Mason* (1872), 22 C. P., at p. 252, and *Peterborough v. Hatton* (1879), 30 C. P., at p. 460.

I do not see any reason to hold (especially as to a place like Pembroke) that the police magistrate has a right to claim a private office in addition to a public one. There can be no difficulty in so ordering the business that it can be efficiently discharged in one room like the council chamber.

By way of illustration let me refer to the methods employed in the English Courts of like jurisdiction. "The magistrate takes his seat in Court, and, before it is opened to the general public, persons wishing to make applications to him are admitted to do so. These applications are chiefly for a warrant or summons in respect of offences, * * but it has been usual for the poor to ask and have advice of the magistrate in matters which, when stated, frequently prove to be beyond his jurisdiction. If he grants process, the applicant goes into an office, (*e.g.*, the clerk's office) where particulars of the complaint are entered, and the fee is paid for the warrant or summons. This fee is receivable by the clerk (see R. S. O. ch. 95 schedule).

The Court * * is then opened to the general public, and the charges which have been entered in the magistrate's register are heard. The lighter charges of drunkenness and disorderly conduct, which involve the attendance of many constables as witnesses * * are first disposed of. Charges of violent assault, for which the accused has

been apprehended, come * * next in order and then indictable crimes. * * Cases arising on summons are generally heard in the afternoon, the defendants being summoned to attend at 2 p. m.: see Ency. of the Laws of England, vol. 10, pp. 153, 154.

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Boyd, C.

Some such routine as this may be adopted by the presiding magistrate who has ample power by force of law and by aid of constables to enforce order and regulate proceedings, according as he sits judicially in open court or ministerially or quasi-judicially in private and preliminary matters: see Criminal Code, secs. 586 (*d*), 849 & 908.

Much purely administrative or ministerial work may be delegated to the clerk, if matters proper for the magistrate himself are likely to occupy a fair day's work.

The defendants were not called upon to furnish facilities for the transaction of business not strictly appertaining to the office of police magistrate for the town, such as troubles arising in the county but outside of the town limits.

Then the case is reduced to a matter of stationery: for this there is a valid claim from 7th April, 1896, by 59 Vict. ch. 51, sec. 35, as interpreted in the light of *Newsome v. The County of Oxford* (1895), 28 O. R. 442; a decision accepted by the Legislature in the amendment afterwards made, R. S. O. ch. 223, sec. 479, sub-sec. 2, by the insertion of the word "stationery."

It is difficult in cases like this, when so much depends upon the generous agreement of the local authorities, legal and municipal, to deal out the precise measure of justice to which the parties are entitled. For example the court room may not be so furnished or arranged as meets the wishes of the plaintiff, it may be that more should be done to suit his convenience than has been indicated.

I hope that nothing has occurred in this litigation which will hamper the town authorities in exercising some discretion beyond the strict legal obligation, if thereby the more harmonious working of town affairs may be promoted and the public convenience served.

Judgment. The money measure of the stationery is \$36 (to April, 1899). This should be paid the plaintiff, but it is not a case for costs.

Boyd, C.

G. A. B.

[DIVISIONAL COURT.]

TEW V. ROUTLEY.

Landlord and Tenant—Lease—Assignment without Leave—Forfeiture—Election—New Lease—Waiver—Distress—Acceleration Clause—Assignment for Benefit of Creditors—Notice under R. S. O. ch. 170, sec. 34, sub-sec. 2—Sale of Goods on Demised Premises—Agreement—Condition—Construction.

A lease of a store was made for five years, at the yearly rental of \$700, payable by even portions quarterly in advance, with the statutory covenant that the lessee should not assign or sublet without leave, and with a proviso that if the lessee should make an assignment for the benefit of creditors, the then current and the next quarter's rent and the taxes for the then current year should immediately become due and payable as rent in arrear and be recoverable by distress or otherwise. During the term, on the 24th January, 1898, the lessee made an assignment for the benefit of his creditors to the plaintiff, who sold the stock of goods in the store to the defendant. By the terms of the agreement of sale the defendant was to assume the rent and taxes and to arrange with the landlord of the premises as to tenancy. On the 14th February, 1898, the defendant's husband went into possession of the store and of the stock of goods, which had remained therein, and continued thereafter in possession of the store. On the 5th April, 1898, the lessors distrained the goods of the defendant in the store for \$644, made up of \$175 rent due on the 1st October, 1897, \$175 rent due on the 1st January, 1898, \$175 for "the next quarter's rent," by virtue of the proviso in the lease, and \$119 for the taxes for 1898, in respect of which sums they claimed to be preferred creditors on the estate of the lessee. The plaintiff paid the claim and costs under protest, and brought an action against the lessors to recover back \$319.32 of it, which action was dismissed on the 14th December, 1898.

On the 17th December, 1898, the lessors made a lease of the store to the defendant's husband to hold for three years from the 14th February, 1898.

In this action the plaintiff alleged that he was entitled to be paid by the defendants \$322, being the proportion of the rent from the 14th February to the 1st July, 1898, which the defendant agreed to assume and pay. At the trial it appeared that the lessors never consented in writing to the assignment of the demised premises to the plaintiff, and that the plaintiff never assigned the premises to the defendant, and that the lessors never recognized as rightful the occupation of the premises by the defendant. The plaintiff did not give notice to the lessors, under R.S.O. ch. 170, sec. 34, sub-sec. 2, electing to retain the store for the unexpired term, or any portion of it:—

Held, that the lessors, by granting the lease of the 17th December, 1898, elected to avoid their former lease, they having done nothing in the meantime to waive the forfeiture thereof incurred by the assignment to the plaintiff. The distress was no waiver of the forfeiture, for it was for rent and taxes which became due by virtue of the provisions of the lease on the date of the assignment. The election to forfeit the original lease referred back to the time when the breach of the terms of that lease occasioning the forfeiture took place, that is, the date of the assignment. The plaintiff might have avoided the forfeiture of the lease and the acceleration of the payment of the rent and taxes by giving, within one month from the execution of the assignment, a notice in writing to the lessors electing to retain the store for the unexpired term or a portion of it.

Held, also, that the condition in the agreement of sale between the plaintiff and defendant, that the latter was to assume the rent and taxes and to arrange with the landlord as to tenancy, did not mean that the defendant was to assume any part of the rent and taxes which by virtue of the provision of the lease had become due on the previous 24th January, but rather that the defendant should arrange with the landlord as to tenancy and assume the rent and taxes payable in virtue of the tenancy so arranged.

By indenture of the 23rd March, 1897, made in pursu- Statement.
ance of the Act respecting short forms of leases, between the Toronto Savings and Loan Company, of the first part, and C. F. Kutzbach, of the second part, the former demised to the latter a certain store, number 379 George street, in the town of Peterborough, to hold for five years from the 1st September, 1897, for the yearly rent of \$700, payable by even portions quarterly in advance, on the first days of October, January, April, and July in each year, which indenture contained the statutory covenant that the lessee should not assign or sublet without leave; and it was thereby further declared and agreed that if the lessee should, amongst other things, make an assignment for the benefit of creditors, the then current and next quarter's rent and the taxes, rates, and assessments for the then current year (to be reckoned upon the rate of previous year in case the rate for the then current year should not have been fixed) should immediately become due and payable as rent in arrear; and in every of the above cases such rent, taxes, rates, and assessments might be collected and recovered by the lessors, by distress or otherwise, in the same manner as rent reserved and in arrear; and in every of the above cases the term thereby granted should, at the option of the lessors, forthwith become forfeited and

Statement. void. The indenture also contained a proviso for re-entry by the lessors on non-payment of rent, whether lawfully demanded or not, or on non-performance of covenants, or seizure or forfeiture of the term for any of the causes aforesaid.

Kutzbach, the lessee, made an assignment for the benefit of his creditors on the 24th January, 1898, to the plaintiff, who advertised the stock of goods in the store, assigned to him, to be sold by Suckling & Co., auctioneers, on the 9th February, 1898; and on that day the defendant signed a letter addressed to the plaintiff and delivered to him, stating that one New was authorized to purchase the Kutzbach stock for her, the defendant; and New attended the sale and purchased the stock of goods and signed an agreement of purchase, embodying, among other conditions, the following: "And upon the full completion of such purchase, the purchaser shall be entitled to be put into possession." "The purchaser shall have four days to check the said inventory and goods, free of expense, after which the purchaser is to assume the rent and taxes and other rates and to arrange with the landlord of the premises as to tenancy."

After the sale the defendant and her husband saw the plaintiff, and the plaintiff gave to the husband a letter addressed to him, signed by the plaintiff, which read as follows: "*Re* Kutzbach Estate. All rent and other preferred claims for which the estate is liable will be arranged up to date you take possession, viz., Monday the 14th February, 1898.

The defendant's husband, accordingly, on the 14th February, 1898, went into possession of the store and of the stock of goods, which had remained therein, and continued in possession of the store thereafter.

The following letters were written by the plaintiff to the defendant's husband:—

23rd February, 1898: "I have written to the Toronto Savings and Loan Company twice asking them to file their claim, and advising them that I could pay all up to date

that you took possession, as we agreed, and to arrange with Statement.
you for the balance. They have not as yet filed their claim, so presume they want to see you make arrangements from the time you took possession until the 1st July. I wish you would see them at once and get the matter in shape, so that I may be able to close out the estate quickly."

8th March, 1898: "I wrote you some days ago with reference to rental. Will you please advise me what has been done herein? Kindly give this your prompt attention on receipt, as I am anxious to close out this estate."

11th March, 1898: "I am much disappointed you did not call * * to arrange *re* Kutzbach rental. Mr. Morrow (the manager of the Toronto Savings and Loan Company) informs me that there has been nothing arranged, and, as I should like to have some understanding with reference to rental, I shall be glad to hear from you at once. There will be a month's rent due next Monday, the 14th inst. As it may be necessary to contest the landlords' claim, so far as the estate is concerned, I shall be glad to hear from you at once as to what you propose doing."

On the 22nd March, 1898, the solicitors of the plaintiff wrote to the solicitors of the defendant (and also of the Toronto Savings and Loan Company) as follows:—

"*Re* Kutzbach Estate.—Mr. Richard Tew, the assignee of the above estate, has handed us your letter of the 21st instant referring to the landlords' claim against this estate. We had previously advised the assignee, on the facts submitted to us, that, in our opinion, the estate was not liable for more than \$350 as a preference claim, and we have gone over the cases referred to by you in your letter, but, as the circumstances are altogether different, we have not been led to change our opinion. No doubt, these cases appear to hold the acceleration good and as equally binding on the assignee; but we are not contesting these points. We have come to the conclusion from the statute that all the landlord is entitled to, in a case like the present, is the arrears of rent at the date of the assignment and the current quarter's rent, and this is the amount we have advised

Statement. the assignee to pay. Your clients, of course, are aware that Mr. Routley has purchased the stock belonging to this estate. The assignee has no agreement with him regarding possession of these premises, and the assignee will not require possession of the premises after the 31st March, up to which date he is willing to pay the rent."

On the 5th April, 1898, the Toronto Savings and Loan Company, claiming that at the date of the assignment there was due to them for arrears of rent under the provisions of the lease the sum of \$350, being the \$175 due on the 1st October, 1897, and the \$175 due on the 1st January, 1898, and in addition thereto that there became due, by virtue of the provisions of the lease and by reason of the assignment for the benefit of creditors by Kutzbach to the plaintiff, a further sum of \$175, being one quarter's rent, and the further sum of \$119 for the taxes for the year 1898, and claiming to be preferred creditors upon the estate of Kutzbach in respect of these sums, making in all \$644, distrained the goods of the defendant in the store above referred to, for that sum, together with \$25.32 costs of distress; and on the 7th April, 1898, the plaintiff paid \$669.32, the full amount of the claim and costs, under protest, and thereupon brought his action against the Toronto Savings and Loan Company to recover \$319.32 and interest from the 8th April, 1898, which action was on the 14th December, 1898, dismissed with costs: see *Tew v. Toronto Savings and Loan Company* (1898), 30 O. R. 76.

On the 17th December, 1898, by indenture of that date, made in pursuance of the Act respecting short forms of leases, between the Toronto Savings and Loan Company, of the first part, and C. B. Routley (the husband of the defendant), of the second part, the party of the first part demised the store above referred to to the party of the second part, to hold for three years from the 14th February, 1898, at the yearly rent or sum of \$700 and taxes, payable in even portions quarterly in advance, on the 14th days of February, May, August, and November in each year; the first payment to be made on the 14th

day of February, 1898; which indenture contained a Statement. covenant to pay taxes.

On the 13th March, 1899, this action was brought in the County Court of York. The plaintiff in his statement of claim alleged that he sold to the defendant the goods and chattels belonging to the estate of Kutzbach and contained in the store referred to, and the defendant entered into possession of the goods and chattels and store upon an agreement with the plaintiff that the rent of the premises should be apportioned between the plaintiff and defendant up to the date on which the defendant took possession, namely, the 14th February, 1898—the plaintiff to assume and pay the rent up to that date, and the defendant the subsequent rent; that the defendant continued in possession of the premises, and, the landlord having demanded payment of the rent and asserted a claim against the Kutzbach estate for payment of the rent, the plaintiff on the 8th April, 1898, paid \$644 for rent and taxes (made up as above set forth); that the proportion of the rent from the 14th February, 1898, to the 1st July, 1898, which the defendant agreed to assume and pay, amounted to \$322; and the plaintiff alleged that that amount and interest thereon from the 8th April, 1898, was due to him by the defendant; but claimed only \$200, abandoning the amount in excess of that sum in order to bring his claim within the jurisdiction of a County Court.

The cause was tried by the junior Judge of the County Court without a jury.

The facts hereinbefore set forth, except the lease from the Toronto Savings and Loan Company to the defendant's husband, were given in evidence, and it also appeared in evidence that that company never consented in writing to the assignment of the demised premises by Kutzbach to the plaintiff, nor did the plaintiff ever assign the demised premises to the defendant, nor did it appear that the Toronto Savings and Loan Company ever recognized

Statement. as rightful the occupation of the demised premises by the defendant.

The plaintiff gave the following, amongst other, evidence: Asked what estate he had in this property, or what right he had to deal with it, he said he had no right to deal with it further than that he had paid the amount of rental; he did not deal with the property; he had never given a notice in writing under the statute, signed by him, stating that he would hold possession any length of time; he believed he could not guarantee to this purchaser occupation of these premises for a day; and he could not lease the property, or sublet it, or assign the lease to Mrs. Routley or Mr. Routley.

The Judge gave judgment for the plaintiff for \$200 and costs, assigning no reasons therefor.

The defendant appealed from the judgment, and her appeal was heard by a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on the 8th November, 1899.

Aylesworth, Q. C., for the appellant.

C. D. Scott, for the plaintiff.

At the argument the Court directed that the lease from the Toronto Savings and Loan Company to the defendant's husband should be adduced in evidence, which was subsequently done.

January 23, 1900. The judgment of the Court was delivered by

ARMOUR, C.J. :—

The Toronto Savings and Loan Company, by granting the lease of the store on the 17th day of December, 1898, to the defendant's husband, elected to avoid their lease to Kutzbach, they having done nothing in the meantime to waive the forfeiture thereof incurred by the assignment

made by Kutzbach to the plaintiff: *Baylis v. LeGros* (1858), Judgment, 4 C. B. N. S. 537.

Armour, C.J.

The distress made by the Toronto Savings and Loan Company on the 5th day of April, 1898, was no waiver of the forfeiture, for it was for rent and taxes which became due by virtue of the provisions of the lease on the date of the assignment, the 24th day of January, 1898: *Cotesworth v. Spokes* (1861), 10 C. B. N. S. 103. And the election by the Toronto Savings and Loan Company to forfeit their lease to Kutzbach referred back to the time when the breach of the terms of that lease occasioning the forfeiture took place, namely, on the 24th January, 1898: *Grimwood v. Moss* (1872), L. R. 7 C. P. 360.

It appears to me that the plaintiff might have avoided the forfeiture of this lease and the acceleration of the payment of the rent and taxes, by giving within one month from the execution of the assignment to him a notice in writing under his hand to the lessors, the Toronto Savings and Loan Company, electing to retain the said store for the unexpired term of such lease or for such portion of such term as he should see fit: R. S. O. ch. 170, sec. 34, sub-sec. 2.

The plaintiff, however, gave no such notice, nor did he deal with the store demised, as he himself swore, in any way.

The only support, therefore, if any, that can be made use of for this action is the condition contained in the agreement by the defendant for the purchase of the goods, namely: "The purchaser shall have four days to check the said inventory and goods, free of expense, after which the purchaser is to assume the rent and taxes and to arrange with the landlord of the premises as to tenancy."

After this agreement was signed interviews between the parties took place, but nothing was said or done at these interviews which could be held to have in any way altered or varied this condition.

This condition forms part of printed conditions of sale intended to apply generally to the sale of goods and chattels

Judgment. belonging to estates, and had no special application to the sale to this defendant, and it is very difficult to say what is the proper construction to be put upon it in this case.

Armour, C.J. But I do not think that it can be held to mean that the defendant is to assume any part of the rent and taxes which by virtue of the provisions of the lease had become due on the previous 24th day of January, 1898, by reason of the assignment made by Kutzbach to the plaintiff.

It would seem rather to mean that the defendant should arrange with the landlord of the premises as to tenancy and assume the rent and taxes payable in virtue of the tenancy so arranged.

It seems to me that in no case has the defendant been guilty of a breach of this condition entitling the plaintiff to maintain this action.

The appeal will therefore be allowed with costs and the action in the Court below dismissed with costs.

E. B. B.

CITY OF TORONTO V. METROPOLITAN R. W. CO.

Railways—Order of Railway Committee of Privy Council of Canada—Junction of Electric Railway with Canadian Pacific Railway—Laying Switch on Highway—Power to Authorize—Consent of Municipality—Expropriation of Right of Way—Injunction—Enforcement of Agreement.

The defendants were a company incorporated under statutes of the Province of Ontario, operating an electric railway upon Yonge street between the town of Newmarket and the city of Toronto, with its southern terminus in the northern part of the city, a few yards north of the Canadian Pacific Railway lines. By order of the 23rd November, 1899, the Railway Committee of the Privy Council of Canada, reciting the consent of counsel on behalf of the corporation of the city of Toronto, approved of the defendants connecting their tracks with the tracks of the Canadian Pacific Railway by means of a switch, as shewn on a plan annexed to the order, and on the conditions imposed by the order:—

Held, that the defendants had not the right, without the authority or consent of the city corporation, to occupy or expropriate or otherwise to force their way over a part of Yonge street within the limits of the city so as to enter the lands of the Canadian Pacific Railway Company and make the proposed junction. The order of the Railway Committee was to be regarded as dealing only with the mode of junction or union, and not as professing to expropriate a right of way over the highway. And the consent of counsel for the city corporation, when before the Railway Committee, was to be viewed in the same way. Section 173 of the Railway Act of Canada does not give the Railway Committee power to expropriate land or to deal with the right of property. The protection of the crossing or junction is the object of the Committee, which has to approve of the place and mode thereof, and which is not concerned, so far as this section applies, with how the railways arrive at the point of union.

Held, also, that the defendants had not, by virtue of any statute or agreement, viewing their road as a mere street railway, the right to expropriate the right of way; and even if their road was a railway within the meaning of the Railway Act, sec. 183 was not applicable, for the proposition here was not to carry the tracks "along an existing highway;" and they could not avail themselves of sec. 187, for the provisions of law applicable to the taking of land by the company had not been complied with.

The plaintiffs were therefore entitled, without derogation of the order of the Railway Committee, to an injunction restraining the defendants from effecting the proposed junction by the method shewn on the plan.

By an agreement made between the plaintiffs and defendants, the defendants agreed that, upon receiving at any time twenty-four hours' notice from the plaintiffs' engineer, they would cease running their cars by electricity on the portion of Yonge street within the city limits:—

Held, that, nothing having occurred to operate as a waiver by the plaintiffs of this term of the agreement, and the notice having been duly given, the plaintiffs were entitled to an injunction restraining the defendants from propelling their cars by electricity within the limits of the city.

By order bearing date the 23rd November, 1899, the Statement.
Railway Committee of the Privy Council of Canada, recit-

Statement. ing the consent of the counsel on behalf of the corporation of the city of Toronto, approved of the defendants connecting their tracks with the tracks of the Canadian Pacific Railway by means of a switch placed upon Yonge street, in the city of Toronto, as shewn on a plan annexed to the order, and on the conditions in the order imposed.

The order having been issued on Saturday the 25th November, 1899, the defendants attempted with a track-laying gang of men to proceed with the work of laying down the switch in accordance with the order, but such work was obstructed and prevented by a squad of constables of the Toronto police force and on the same evening on the application of the plaintiffs, *ex parte*, an order was made by ROYD, C., in the nature of an *interim* injunction, restraining the defendants, their servants and agents, from taking any steps whatever toward effecting a junction of the line of the defendants with the Canadian Pacific Railway.

The plaintiffs moved to continue the injunction, and further to restrain the defendants from using electricity or propelling their cars by electricity within the limits of the city of Toronto, upon the following, among other, grounds :

1. That the sole jurisdiction and control of the streets of the city of Toronto were vested in the plaintiffs and no interference could be had therewith under existing legislation by the defendants without the plaintiffs' consent.

2. That there was no charter or statutory authority enabling the defendants to make the proposed junction through or over the streets of the city without the plaintiffs' consent.

3. That the Railway Committee of the Privy Council had no power to order a junction or the mode of a junction of a railway such as the defendants', which was founded in municipal jurisdiction, with a railway such as the Canadian Pacific Railway, which depended for its existence and powers on Dominion legislation.

4. That the Railway Committee of the Privy Council had no authority or jurisdiction to order the junction until all

the consents and other preliminaries necessary thereto had been obtained from the plaintiffs and others who had rights in the property to be affected by such junction. Statement.

5. That the defendants had exhausted all their rights to extend their line in the proposed direction under their charter by their present location of their road, and could not remove or advance their railway or the construction thereof without having either authority from the Legislature or the consent of the municipalities having jurisdiction over the street or highway, and no such consent had been given.

6. That the defendants proposed and intended to use the junction and the portion of Yonge street within the city of Toronto for the purpose of hauling freight of various kinds as a feeder to, or part of, the Canadian Pacific Railway, and would be and become practically a railway for ordinary purposes, and would be using the streets of the city of Toronto for such purposes; and such user was never in contemplation of the plaintiffs or of the defendants or of any legislation authorizing the existence of the defendants as a company, or of their railway, and was not contemplated by any municipal consent given to the defendants.

7. That the defendants and plaintiffs entered into an agreement by which the defendants were permitted by the plaintiffs to use electricity upon their road only during the pleasure of, and subject to notice by, the plaintiffs, as set out in the agreement, the object of which was to prevent the defendants from using the roadway for a freight road such as that now contemplated; the defendants had given notice discontinuing the right to use electricity under the agreement, but the defendants still persisted in using it.

The motion came before FALCONBRIDGE, J., in the Weekly Court, on the 5th December, 1899, and was, by agreement, turned into a motion for judgment, and argued as such on that day, and by written arguments delivered up till the 15th December, 1899.

Argument.

Osler, Q. C., for the plaintiffs. The jurisdiction of the Railway Committee of the Privy Council is found in 56 Vict. ch. 27, sec. 1 (D.), which substitutes a new sec. 173 for that section ~~as~~ found in the Railway Act of Canada. We have to do with a municipal road incorporated by Provincial legislation, having the power to occupy any street in the municipality only by its consent. The Railway Committee have power to order a junction with another railway, but they have only power to order a crossing with an electric railway or tramway ; that is for the purpose of avoiding having the tramway come under Dominion legislation by virtue of sec. 306 of the Railway Act. The new sec. 173 shews clearly the intention of the Legislature not to give the jurisdiction which is here sought to be enforced, and there is no power under the Dominion legislation to order this junction. Then, by sec. 20 of 60 Vict. ch. 92 (O.), these defendants have no power to work by electricity in the city without consent, and the consent has been withdrawn by notice. The defendants, in order to make the proposed junction, have to occupy fifty feet more of the street than they already do, and they have no consent to that occupation.

Caswell, on the same side, referred to the various statutory enactments governing the defendants, which are referred to in the judgment.

Aylesworth, Q. C., for the defendants. The matter is purely one of the jurisdiction of the Railway Committee, and so we present it. Section 173 is no enabling section, conferring jurisdiction upon the Railway Committee. It is a prohibition upon certain companies. It says in the case of railways that there shall not be crossing, intersection, or uniting without leave ; but in the case of a street railway or tramway, there is no prohibition on uniting without leave. It is just because the defendants' line is a railway, and not a mere tramway, that they are prohibited from uniting without leave. The Railway Committee is constituted by the Railway Act of Canada, 51 Vict. ch. 29, secs. 8 to 25 inclusive, and is just as thoroughly a Court as the

High Court of Justice for Ontario: *The Queen v. Local Government Board* (1882), 10 Q. B. D. at p. 321; *Ex p. Kingstown Commissioners* (1885), 16 L. R. Ir. at p. 156; *Re Godson and City of Toronto* (1889), 16 A. R. 452. The power exercised by the Railway Committee was supported by our Courts in *Re Canadian Pacific R. W. Co. and County and Township of York* (1896-8), 27 O. R. 559, 25 A. R. 65. The plaintiffs were parties to the proceedings before the Railway Committee. By what right do they, after the decision of that Court has gone against them, resort to another Court to restrain their adversaries from carrying out the decree the Court has pronounced? This Court would have jurisdiction to prohibit the Railway Committee if it exceeded its jurisdiction, we concede, but its jurisdiction cannot be assailed in this indirect way. But, if the question of jurisdiction can be gone into, the Railway Committee had authority to inquire into and decide this matter. The defendants, by their Acts of incorporation and by their powers, are a railway company. (Reference to the statutes set out in the judgment.) What right has a third party to interfere in the terms of a contract made between two companies? We are not intending to lay our tracks upon the highway further than by law we are entitled to do. The plaintiffs are bound by the consent given by their counsel when before the Railway Committee—before a Court in fact: *Matthews v. Munster* (1887), 20 Q. B. D. 141. The defendants do not rely upon this consent as conferring jurisdiction. But the course taken by counsel before the Committee was the foundation of the agreement then entered into. As to the agreement between the parties regarding the use of electricity, the plaintiffs are not entitled to an injunction on that ground, but should be left to their remedy in damages. And, besides, the order of the Committee authorized the connection to be subject to the terms of the resolution of the county council of the county of York, and the terms of that resolution, annexed thereto, require the use of electricity. To that counsel for the plaintiffs consented, and that consent is not repudiated.

Argument.

Walter Barwick, Q. C., on the same side. Under the original agreement between the county and the defendants, the defendants are empowered to lay down and operate switches and turgouts, and when the county conveyed the 1300 feet to the city, it conveyed subject to the terms of this agreement. Electricity does not make a railway a tramway : sec. 90 (k) of the Railway Act. Section 4 of the Railway Act makes it perfectly clear that the Railway Committee has power to deal with this question. The defendants are carrying on an extensive freight business, and the whole of that business has to be carried on subject to the control of the Committee.

Osler, in reply (written), referred as to the effect of the incorporation of certain clauses of the Railway Act to *Toronto R. W. Co. v. The Queen* (1895), 25 S. C. R. 24, 25, 32, 35 ; as to the powers of the Court where a railway is constructed along or upon a highway to *West v. Parkdale* (1884-7), 7 O. R. at p. 270, 12 A. R. at p. 393, 12 S. C. R. at p. 250, and 12 App. Cas. at p. 602 ; *Hendrie v. Toronto, Hamilton, and Buffalo R. W. Co.* (1895), 26 O. R. 667, 27 O. R. 46 ; as to whether the Railway Committee is a Court, to *Re Canadian Pacific R. W. Co. and County and Township of York* (1898), 25 A. R. at pp. 65, 66 ; as to whether prohibition is the proper remedy, to *High on Extraordinary Legal Remedies*, 2nd ed., p. 610 ; as to consent not conferring jurisdiction, to *Bigelow on Estoppel*, 4th ed., p. 51 ; *The Queen v. Hutchings* (1881), 6 Q. B. D. 300 ; *In re Aylmer* (1887), 20 Q. B. D. at p. 262 ; *The Queen v. Judge of County Court of Shropshire* (1887), 57 L. J. Q. B. 143, 20 Q. B. D. 248 ; *Ready v. Odium* (1870), 19 W. R. 135 ; *Eng. & Am. Ency. of Law*, 1st ed., tit. "Jurisdiction," vol. 12, p. 301, note 2 ; *Foster v. Usherwood* (1877), 3 Ex. D. 3 ; *Buse v. Roper* (1879), 41 L. T. 457 ; *Wellesley v. Withers* (1855), 4 E. & B. at p. 759 ; *Green v. Rutherford* (1750), 1 Ves. Sr. 462 ; as to the authority of counsel, to *Doran v. Great Western R. W. Co.* (1857), 14 U. C. R. at p. 411 ; *Watt v. Clark* (1887), 12 P. R. 359 ; *Stokes v. Latham* (1888), 4 Times L. R. 305 ; as to consent of the corporation

being valueless without a by-law, to sec. 325 of the Municipal Act; *Waterous Engine Co. v. Town of Palmerston* (1891-2), 20 O. R. 411, 19 A. R. 47, 21 S. C. R. 556; *Canadian Pacific R. W. Co. v. Town of Chatham* (1892-6), 25 O. R. 465, 22 A. R. 330, 25 S. C. R. 608; and also discussed the statutes, agreements, and facts generally.

Barwick rejoined (in writing) upon the facts and the statutes.

January 11, 1900. FALCONBRIDGE, J.:—

The principal point argued on the first branch of the case was as to the jurisdiction of the Railway Committee of the Privy Council to make the order in question, and this involves a consideration of the various Acts respecting the defendants. The present section of the Railway Act relating to the jurisdiction of the Committee over crossings is the 56 Vict. ch. 27, sec. 1 (D.), substituting a new section for sec. 173 of the Railway Act:

“ 173. The railway of any company shall not be crossed, intersected, joined or united by or with any other railway, nor shall any railway be intersected or crossed by any street railway, electric railway or tramway, whether constructed under Dominion or provincial or municipal authority or otherwise, unless the place and mode of the proposed crossing, intersection, or junction or union, are first approved by the Railway Committee, on application therefor,—of which application ten clear days' notice in writing shall be given by the party or company desiring the approval, such notice to be sent by mail addressed to the president, general manager, managing director, secretary, or superintendent of the company whose railway is to be so crossed, intersected, joined or united; and in the case of crossing by street railways, electric railways or tramways respectively, the Railway Committee shall have the same powers in all respects as to the protection of such crossing and otherwise as are given the Railway Committee by this Act in regard to one railway crossing

Judgment. another." With which may be read secs. 4, 174, 177, and Falconbridge, 306 of the Railway Act, as follows:—

J.

"4. In addition, all the provisions of this Act relating to any subject or matter within the legislative authority of the Parliament of Canada, and for greater certainty but not so as to restrict the generality of the foregoing terms, all provisions relating to railway crossings and junctions, offences and penalties and statistics apply to all persons, companies and railways whether otherwise within the legislative authority of Parliament or not."

"174. The Railway Committee may make such orders and give such directions respecting the proposed crossing, intersection, junction or union, and the works to be executed and the measures to be taken by the respective companies, as to it appear necessary or expedient to secure the public safety."

"177. Every railway company incorporated by any Act of the Legislature of any Province which crosses, intersects, joins or unites with any railway within the legislative authority of the Parliament of Canada, or which is crossed, or intersected by, or joined or united with any such railway shall, in respect of such crossing, intersection junction and union, and all matters preliminary or incident thereto, be deemed to be, and be, within the legislative authority of the Parliament of Canada, and subject in respect thereof to the provisions of this Act."

And by sec. 306 certain railways, among which are the Grand Trunk Railway and the Canadian Pacific Railway, are declared to be works for the general advantage of Canada, "and each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway or any of them, is a work for the general advantage of Canada."

If the purpose and intent of the defendant company were to intersect or cross the Canadian Pacific Railway, it is quite plain that the Railway Committee would be authorized to approve of the place and mode of the proposed crossing, but what is intended here is that the

Canadian Pacific Railway shall be joined by or united with the defendants' line, and one of the questions to be considered may be whether the defendants are a railway within the meaning of this section. Judgment.
Falconbridge,
J.

The defendant company was incorporated by 40 Vict. ch. 84 (O.), entitled "An Act to incorporate The Metropolitan Street Railway Company of Toronto." By sec. 2, the several clauses of C. S. C. ch. 66 and amendments thereto with respect to interpretation, incorporation, powers, lands and surveys, etc., are, so far as not inconsistent with any of the provisions of this Act, incorporated with the Act, with certain exceptions. By sec. 8, the company is authorized and empowered to construct and operate remove and change, a double or single track iron railway, with the necessary side-tracks and turnouts, upon and along such streets and highways and railway tracks within the jurisdiction of the city of Toronto, and of any adjoining municipalities, as the company may be authorized to pass along, under and subject to any agreement thereafter to be made as to construction, etc., and under and subject to by-laws of the city and municipalities respectively, and to carry passengers by the force or power of animals or such other motive power as may be authorized by the council of the said city and municipalities, and outside the limits of the city of Toronto to carry freight, etc. By sec. 17 municipalities and the company are authorized to make agreements relating to the construction of the railway, for paving, etc., of streets, construction, etc., of drains, laying of gas and water pipes, etc., pattern of rails, time and speed of running of cars, etc.; provided that the powers contained in the Act should remain in abeyance until the agreements in this clause mentioned should have been entered into. By sec. 18, the municipalities are authorized to pass by-laws and amend, etc., the same to carry into effect any such agreements and for regulating traffic, etc.

By Consolidated Statutes of Canada ch. 66, the Railway Act,

Judgment."Powers."

Falconbridge,
J.

"9. The company shall have power and authority :

"Fourthly—To make, carry or place the railway across or upon the lands of any corporation or person on the line of the railway, or within the distance from such line stated in the special Act, although through error or other cause, the name of such party has not been entered in the book of reference hereinafter mentioned, or although some other party has been erroneously mentioned as the owner of or entitled to convey, or is interested in such lands ;"

"Sixthly—To make, complete, alter and keep in repair the railway with one or more sets of rails or tracks to be worked by the force and power of steam, or of the atmosphere, or of animals, or by mechanical power, or by any combination of them ;"

"Eighthly—To make branch railways, if required and provided by the special Act, and to manage the same, and for that purpose to exercise all the powers, privileges and authorities necessary therefor, in as full and ample a manner as for the railway ;

"Ninthly—To construct, erect and make all other matters and things necessary and convenient for the making, extending and using of the railway, in pursuance of and according to the meaning and intent of this Act, and of the special Act ;

"Tenthly—To take, transport, carry and convey persons and goods on the railway, to regulate the time and manner in which the same shall be transported, and the tolls and compensation to be paid therefor, and to receive such tolls and compensation ;"

"Fifteenthly—To cross, intersect, join and unite the railway with any other railway at any point on its route, and upon the lands of such other railway, with the necessary conveniences for the purposes of such connection ; and the owners of both railways may unite in forming such intersection, and grant the facilities therefor ; and in case of disagreement upon the amount of compensation to be made therefor, or upon the point or manner of such

crossing and connection, the same shall be determined by ^{Judgment.} arbitrators to be appointed by a Judge of one of the ^{Falconbridge,} Superior Courts in Lower Canada or Upper Canada, as the ^{J.} case may be: 14, 15 Vict. c. 51, s. 9, No. 15; see 22 Vict. c. 4, s. 2."

The next statute is the 56 Vict. ch. 94 (O.) By sec. 1, the name is changed to "The Metropolitan Street Railway Company." Section 2 confirms six agreements between the municipal council of the county of York and the Metropolitan Street Railway Company. Section 4 authorizes the company to extend, etc., their line of railway within the county of York, to lake Simcoe, and to build branches to the village of Markham, town of Newmarket, and the village of Schomberg. Section 5 applies the clauses of the Railway Act which were made a part of the original Act of incorporation to the extensions. By sec. 6 the company has power to take, transport and carry passengers, freight, express and mail matter over their railway and the extensions. By sec. 7, the said company may operate their railway as an electric railway, and may construct, maintain and operate works for the production of electricity for their own purposes, and may along that part of their extensions outside of the limits of the township of York, sell or lease electricity, but not without the consent of the municipalities: provided that nothing in this section contained shall be deemed to confer on the said company the right to use electric power within the limits of the city of Toronto without the consent of the said city.

By sec. 11, nothing herein contained shall in any way affect the rights of the city of Toronto under an agreement with the county of York, dated 21st August, 1888, and the rights, if any, of the Toronto Railway Company, or of the city, under the agreement referred to in 55 Vict. ch. 99, or otherwise under the agreements between the defendants and the plaintiffs dated 7th July, 1890, 12th May, 1891, and August, 1892.

The several agreements referred to in this statute, some

Judgment. of which are not printed in the schedule, will, so far as
Falconbridge, material, be referred to hereafter.

J.

The last statute is the 60 Vict. ch. 92 (O.) By sec. 1, the name of the company is changed to "The Metropolitan Railway Company," but the powers, rights and liabilities of the company are not to be affected by the change of name, and all agreements, powers, rights, franchises, etc., remain valid and binding. By sec. 2, the powers of construction of the company are very widely extended within the counties of York and Simcoe. By sec. 3, the gauge of the company's railway may be four feet, ten and one-half inches. By sec. 4, the railway may be carried along and operated upon such streets and highways as have been or may be authorized by the respective corporations, subject to agreements between the company and the councils. By sec. 5, the company may operate its railway or any part thereof by electricity, cable, or horse power, and may use steam along any street or highway within a corporation if the corporation consents after notice in the Ontario Gazette. By sec. 6, the company may purchase or hire electric power, and may operate any part of its railway as an electric railway, and may construct works for production of electricity, and may lease electricity to any person under R. S. O. ch. 165, but the company shall not exercise any powers under that Act without the consent of the municipality by by-law: provided that in the event of the city of Toronto extending its limits, such extension shall not affect the rights of the company at the date of such extension, but nothing in the section shall be deemed to confer on the company the right to sell electric power within the present limits of the city, notwithstanding any future extension of the city limits. By sec. 7, the company may enter into agreements with other companies or persons for leasing motors, carriages, etc., from such companies or persons, and may enter into agreements with any other railway company for the use by one or more of such contracting companies of the locomotives, carriages, etc., of the other or for the running of cars or carriages of

the company over the track of any other company with the consent of such company. By sec. 8, the company is authorized and empowered to agree with the Canadian Pacific Railway Company, the Grand Trunk Railway Company, the Toronto Railway Company, and the express companies, or either of them, for the interchange of cars and traffic and for connections and running arrangements, upon terms to be approved of by shareholders. By sec. 15, agreements between the corporation of the county of York and the defendant company, dated 6th April, 1894, and 7th February, 1896, are confirmed. By sec. 16, notwithstanding any provision to the contrary in any other Act, the company's railway may cross the railway of any other company upon a level therewith, with the consent of such other company, or with the authority of the Railway Committee of the Privy Council. By sec. 20, nothing in this Act contained shall be deemed to confer on the said company the right to use electric or cable power within the limits of the city of Toronto, without the consent of the said city.

20th June, 1884. Agreement between the company and the county of York printed at p. 457 *et seq.* of the Statutes of Ontario 56 Vict. (1893) Schedule "A" to the Act respecting the Metropolitan Street Railway Company.

The following are extracts from this agreement :—

1. " That the parties of the second part their successors and assigns be permitted without let or hindrance from the said parties of the first part their successors or assigns, to construct, maintain, complete and operate, and from time to time remove and repair an iron or steel street rail track or tramway with the necessary culverts, switches, and turn-outs, such switches or turn-outs not to exceed four in number, or one hundred feet each in length clear of curves, for the passage of cars, carriages, and other vehicles adapted to the same in, upon and along that portion of Yonge street lying between the northern limit of the city of Toronto and the present centre of the front of the town hall of the township of York at Egling-

Judgment.
Falconbridge,
J.

Judgment. ton, such railway being of approved construction and
Falconbridge, worked under such regulations as may be necessary for
J. the protection of the inhabitants and the general public,
and being subject always to the provisions of this agree-
ment; and in all cases where switches and turn-outs are
constructed, the said company shall extend the road metal
on the macadamized portion of the road to a distance of
at least sixteen feet beyond the outside rail of the siding,
the full length of such siding."

18. "The parties of the second part shall have the exclusive right and privilege to construct a street rail or tramway in and upon the said portion of Yonge street, subject to the observance of the conditions and agreements herein contained."

Extracts from agreement between the county of York and the company dated 6th April, 1894, and referred to in sec. 15 of the statute 60 Vict. ch. 92 (O.) and set out at p. 694 *et seq.* :—

1. "The company shall have the right, so far as the county has power to grant the same, to extend and operate its line of railway by electric, cable, or horse power, from its present terminus northerly on Yonge street to Lake Simcoe.

11. "The company may deflect its line from Yonge street and operate the same across and along private properties after expropriating the necessary rights of way under the provisions of the statutes in that behalf.

26. "The company shall use its railway for the conveyance of such freight, goods or merchandise as shall from time to time be named by the committee, but the company shall not be compelled to carry more than four tons of freight per car, and the rates to be charged therefor shall from time to time be agreed upon by and between the council of the county or the committee on the one part, and the company on the other part, and in case any difference shall arise in settling or fixing upon the rates to be charged, then the same shall be submitted to the Lieutenant-Governor in Council, who shall determine,

settle and approve of the rates to be charged by the company, and all rates that may be charged, whether agreed upon in such manner or otherwise settled, shall be subject to the revision of the Lieutenant-Governor in Council from time to time. The directors of the company shall from time to time print and stick up, or cause to be printed and stuck up, in the company's offices and in all and every of the places where such rates are to be collected, a painted or printed board or paper exhibiting all the rates chargeable by the company for the carriage of freight, goods or merchandise, or of any matter or thing."

Judgment.
Falconbridge,
J.

The company began operating its railway on Yonge street in 1885, from the present southern terminus, which is about 50 feet north of Cottingham street, in Toronto. At that time the northern limit of the city of Toronto, crossing Yonge street, was Cottingham street; and Yonge street between Cottingham street and Lake Simcoe was vested in the municipality of the united counties of York and Peel under the provisions of an order in council dated 4th April, 1865, and set out in the *Canada Gazette* of that year at page 1235. The chain of title is shewn by the following statutes: C. S. C. ch. 28, sec. 76 *et seq.*, and sec. 10, and schedule A.; 12 Vict. ch. 5, sec. 12; 14 & 15 Vict. ch. 124. By 29 Vict. ch. 69, this and other York roads were vested in the county of York, and the county of Peel was relieved from all liability therefor. By proclamation of the Lieutenant-Governor of Ontario bearing date 24th September, 1887, and printed in the *Ontario Gazette* of that year at page 1084, certain additions were made to the city of Toronto, which said additions of territory were directed to take effect from the first Monday of January then following. This had the effect of extending the northern limit of Toronto to a line drawn across Yonge street distant about 1200 feet from the northern limit of Cottingham street.

By indenture made the 20th August, 1888, between the corporation of the county of York and the corporation of

Judgment.
Falconbridge,
J.

the city of Toronto, after reciting that the corporation of York are the owners of certain public toll roads known as Yonge street and Dundas street, and that the corporation of the city of Toronto are desirous of purchasing those portions thereafter described, and that the corporation of York had agreed to sell the same, subject to all existing rights of the public or of any person or corporation, and particularly to the rights of the defendant company, and further reciting the passing of a by-law authorizing the warden, on payment of \$2,500, to execute a conveyance, it is witnessed that the corporation of York did grant unto the plaintiffs, their successors, etc., 1320 feet, more or less, of Yonge street, habendum to the plaintiffs, subject nevertheless to the rights of the defendant company under the agreements of the 25th June, 1884, and 20th January, 1886, and to all existing rights of the public or of any person or corporation in respect of the said road.

The defendants' railway has been constructed and is now in operation between the said southern terminus and the town of Newmarket, a distance of about 30 miles, and is operated throughout its entire distance by electricity, passing on its way between the city and Newmarket more than a dozen considerable towns and villages.

It is claimed on the part of the defendants that they are now engaged in carrying on a large freight business along their line of railway, but that they are greatly hampered in their operations by reason of having no proper terminal facilities at their southern terminus in Toronto, and that therefore the interchange of traffic at the Toronto terminus is of necessity conducted upon the public highway of Yonge street, and it is alleged on the defendants' part that, with a view of securing proper facilities for the conduct of their business, the company entered into an arrangement with the Canadian Pacific Railway Company, whereby connection was proposed to be made between the defendant company's tracks at the southern terminus and the tracks of the Canadian Pacific Railway. But it is alleged by the plaintiffs, as set forth in their notice of

motion, that the defendants purpose and intend to use the said junction and the said portion of Yonge street within the city of Toronto for the purpose of hauling freight of various kinds as a part of the Canadian Pacific Railway system, and that such user was never in contemplation of any legislation regarding the defendant company, nor of any municipal consent given to them. Judgment.
Falconbridge,
J.

Whatever may be the abstract merits of the case, as set forth in the respective contentions of the parties, the matter comes before me as a mere dry question of law, to be disposed of upon the construction and interpretation of the statutes and agreements, without reference to the alleged motives or interests of the parties, and also, probably, without reference to the balance of public convenience.

After a careful consideration of the various enactments and agreements, I have come to the conclusion that the real crux of the case is whether the defendants have the right, without the authority or consent of the city of Toronto, to occupy or expropriate, or otherwise to force their way over the street, so as to enter the land of the Canadian Pacific Railway Company, and make the proposed junction.

And if the decision on this point should be adverse to the defendants, the order of the Railway Committee may be quite *intra vires* and regular as dealing only with the mode of junction or union, and not expropriating or professing to expropriate part of a public highway, whether the soil thereof is vested in the city or in the Crown.

And I think that the consent of the counsel for the city, having regard to the nature and extent of the authority of the city's representatives, whether express or implied, is to be viewed in the same light. The city's representatives, protesting against the proposed connection and against the jurisdiction of the Committee, make the best terms they can as to the mode of union, but do not thereby assume to give a conveyance of the right of way from the present track of the defendants to the lands of the Canadian

Judgment. **Pacific Railway Company.** Section 173 does not give any **Falconbridge, J.** power to expropriate land, or to deal with the right of property.

The protection of the crossing or junction is the object of the Committee, which has to approve of the place and mode thereof, and which apparently is not concerned, so far as this section applies, with how the railways arrive at the point of union.

As a mere street railway, and under their different Acts and agreements, no such rights are conferred on the defendants that I have been able to discover.

If the defendants have such right, it can only exist by virtue of the application of certain clauses of the Railway Act, or because they are not merely a street railway but a "railway" within the meaning of the Railway Act.

By sec. 2 (as recited above) of the Act of incorporation, 40 Vict. ch. 84 (passed in 1877), certain clauses of C. S. C. ch. 66 and amendments thereto are applied to the company and their railway: "in so far only as they are not inconsistent with, or repugnant to, any of the provisions of this Act."

It is argued that the scope and intention of the 40 Vict. ch. 84, and its amendments, cannot involve or include the conferring of the right to expropriate lands. The section then goes on to say that (2) "the several clause (*sic*) of the said ch. 66 in respect to "powers," "plans and surveys," and "lands and their valuation," shall apply to the said company only so far as regards the portions of the railway outside the limits of the city of Toronto."

The land in question was in 1877 outside the limits of the city. It became part of the city in 1888. The statute is speaking not alone with reference to the condition of affairs when it was passed, but also with reference to the condition of affairs as it exists when the defendants seek to exercise the powers in question.

The defendants have not obtained any municipal consent to cross on the line of the proposed curve, even granting that they have the right to cross the Canadian

Pacific Railway tracks down Yonge street to Cottingham street on the line of their own railway.

Judgment.
Falconbridge,
J.

The proposed curve is not a mere switch or turnout which the defendants are authorized to construct.

Neither by their charter nor by agreement, then, have the defendants the right to do what they propose.

But if they are a railway within the meaning of the Railway Act, sec. 183 is not applicable, for the proposition here is not to carry the railway "along an existing highway," and they cannot avail themselves of sec. 187, for the provisions of law applicable to the taking of land by the company have not been complied with.

Other aspects of the case have been presented by counsel with much ingenuity and force, but, although I have spent a great deal of time in considering them, it is not necessary to pursue them further, as I think, on the short ground stated above, the plaintiffs are, without derogation of the order of the Railway Committee, entitled to succeed, and there will be a perpetual injunction accordingly.

As to the second branch of the case, by the agreement of the 12th May, 1891, the defendants agree and undertake with the plaintiffs that upon receiving at any time twenty-four hours' notice from the city engineer or other officer authorized by the city council to give such notice, they will cease running their cars by electricity or cable over that portion of Yonge street within the city limits.

Nothing has occurred at Toronto or Ottawa to operate as a waiver by the city of this term of the agreement, and the city engineer's notice was served on the 14th November, 1899.

The plaintiffs are, therefore, technically entitled to this injunction also.

It was apparent to me that the city gave this notice and launched this motion only to secure an additional weapon with which to defend itself against the company's supposed encroachments, perhaps even to carry the war into the enemy's camp, and so I suspend the issuing of this

Judgment. injunction for whatever time may be necessary to lodge
Falconbridge, the appeal which will no doubt follow in due course.

J. The city is entitled to its costs of the action and of the motion.

And as to the whole case there will be whatever stay of proceedings is reasonable and necessary for purposes of appeal.

E. B. B.

THE ONTARIO MINING COMPANY V. SEYBOLD.

Constitutional Law—Indians and Lands Reserved for Indians—Surrender of Indian Lands—Special Provisions in Treaty of Surrender—Crown Patent—Precious Metals—B. N. A. Act, sec. 91, sub-sec. 24, ib., sec. 109—Acquiescence of Government.

A treaty of surrender of Indian territory to the Dominion of Canada in 1873, provided that certain lesser reserves in the lands surrendered, were to be defined and set apart, and thereafter to be administered and dealt with, and with the consent of the Indians first obtained, sold, leased, or otherwise disposed of by the Dominion for the benefit of the Indians. Part of one of these lesser reserves so set apart, and situate in the Province of Ontario, was in 1886 surrendered to the Queen under the Indian Act of 1880, 43 Vict. ch. 28 (D.), in trust to sell the same upon such terms as the Dominion might deem most conducive to the welfare of the Indians; and of this, the lands in question were patented by the Dominion to the plaintiffs, including the precious metals therein. The defendants asserted title in fee to the same lands by virtue of an Ontario patent of 1899. It appeared that in negotiating the treaty in 1873, the Dominion commissioners represented to the Indians that they would be entitled to the benefit of any minerals that might be discovered on any of the lesser reserves to be thereafter delimited:—

Held, that after the surrender in 1886, title to the land and to the precious metals therein could be obtained only from the Crown as represented by the Province of Ontario. With the royal mines and minerals the Indians had no concern; nor could the Dominion make any valid stipulation with them which could affect the rights of Ontario. *Seem*, a Province is not to be held bound by alleged acts of acquiescence of various departmental officers which are not brought home to or authorized by the proper executive or administrative organs of the Provincial government, and are not manifested by any order in council or other authentic testimony.

Statement. THIS was an action brought by the Ontario Mining Company against E. Seybold, E. B. Osler, J. W. Moyes, E. Johnston, J. W. Brown, E. H. Ambrose, and J. S. Ewart, as grantees of the Province of Ontario for a declaration that

by virtue of letters patent issued by the Dominion of Canada to the predecessors in title of the plaintiffs, the latter were entitled to the lands in question which were part of Sultana island in the Rainy River district, and also to set aside the letters patent issued by the Province to the defendants and for an injunction and other incidental relief. Statement.

The locus is situate in what was formerly known as the disputed territory, but is within the boundaries of Ontario as declared by the order of the Imperial Privy Council of August 11th, 1884, and the subsequent Imperial Statute, 52 & 53 Vict. ch. 28, passed on the 12th of August, 1889. The lands in question were included in the territory surrendered by the Indians in 1873, by the North-West Angle Treaty No. 3.

By this treaty the Dominion undertook to lay aside reserves for the Indians, and in 1879, Sultana island was included in Indian reserve 38 B., by the Dominion officials, under the authority of the Minister of the Interior, but the selection of the reserve was not confirmed by order in council. At the time of the selection of the reserve the Dominion claimed that the whole of the territory in dispute was west of the Province of Ontario, and therefore, under the control of the Dominion.

On October 8th, 1886, the Indians surrendered the whole of Sultana island to the Dominion in trust to sell for the benefit of the Indians, and this surrender was, on March 15th, 1887, approved by Dominion order in council. On September 15th, 1888, Dominion regulations for the sale of Indian lands were passed, and in 1889 and 1890, letters patent were issued by the Dominion to A. C. McMicken, George Heenan, and H. G. McMicken, of three locations on Sultana island.

Quit claim deeds were executed by the Dominion patentees in favour of the Ontario Mining Company which was formed for the purpose of acquiring the whole of the balance of Sultana island except that part occupied by

Statement. Sultana mine,* and the plaintiffs proved that they had acquired quit claim deeds from the applicants to the Dominion for the balance of Sultana island. Owing to the decision of the Privy Council in the *St. Catherine's Milling Company* case, no further patents than these three were issued by the Dominion authorities. Before the Dominion patents were issued a formal protest was made by the Crown Land Department of Ontario against the Dominion dealing with Sultana island.

In 1894, the plaintiffs applied to the Ontario Government to confirm their titles pointing out that under the decision of the *St. Catherine's Milling Company* case, the title was vested in the Province of Ontario, and subsequently on June 9th, 1897, presented a petition to the Commissioner of Crown Lands, to the Minister of Justice at Ottawa, and the Minister of the Interior asking for the confirmation of their titles.

The matter was argued before the Commissioner of Crown Lands, the various applicants to the Ontario Government and the Ontario Mining Company, being represented.

The Commissioner of Crown Lands made his ruling on November 22nd, 1898, granting a two-thirds interest to the defendants, disallowing certain other claims, and granting a one-third interest to the Ontario Mining Company subject to the condition that the said interest should be accepted by the company as its entire interest in the property in question and that there should be a waiver or abandonment of any larger interest under the Dominion patents or under any application which had been made to the Dominion Government.

The plaintiffs refused to accept the condition and brought this action to set aside the Ontario patents and thereupon the Commissioner of Crown Lands cancelled his ruling in their favour.

* Sultana mine was on a portion of Sultana island patented by the Dominion in 1888, which patent had been declared void by ROSE, J., in *Caldwell v. Fraser*, unreported, see post p. 400.—REP.

It also appeared that pursuant to concurrent legislation by the Dominion and Province in 1891, an agreement dated April 16th, 1894, was entered into between the Province of Ontario and the Dominion as to Indian reserves by which it was recited that the Province of Ontario was no party to the said treaty and had not concurred in the selection of the said reserves. Statement.

The action was tried at Toronto before BOYD, C., on October 26th, 27th, and November 10th, 1899.

Robinson, Q.C., Laidlaw, Q.C., and J. Bicknell, for the plaintiffs (1), contended that since *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46, it had been settled that the Dominion have exclusive jurisdiction over lands reserved for Indians, and that this jurisdiction includes lands however reserved and is not to be restricted to special Indian reserves; that pursuant to this jurisdiction the Dominion had passed the Indian Act which provided for the surrender of Indian reserves and the sale thereof, and that if the Dominion had not the power to deal with these reserves the Dominion legislation would be nugatory; that Indian reserve 38 B., including Sultana island, had been set apart by Dominion authority and the selection had been entirely concurred in by the provincial authorities; that the jurisdiction and control of the reserves and the administration thereof was vested in the Crown in right of the Dominion of Canada; that the Province had adopted the treaty and having accepted the benefit of it must be bound by all its terms including the one that reserves when surrendered must be sold by the Dominion; and that the condition imposed by the Commissioner of Crown Lands was *ultra vires*.

G. F. Shepley, Q.C., for the Minister of Justice, stated that subject to the action of the Dominion Government and their agreement of April 16th, 1894, the Minister of Jus-

(1) The argument has only been reported in respect to the points on which the judgment turns.—REP.

Argument. tice adopted the arguments of the plaintiffs and claimed further that the Ontario patents should not have been issued in view of the agreement of 1894, and that if the Ontario Government did not acquiesce in the selection of the reserves a commission should be appointed pursuant to the agreement sanctioned by the legislation of 1891.

Osler, Q.C., and *A. M. Stewart*, for the defendant *E. B. Osler*, said that they did not attack the surrender by the Indians in the treaty of 1873 or the subsequent surrender of 1886, but adopted them as interpreted by Lord Watson in the *St. Catherine's Milling Company* case; and contended that the effect of these surrenders was to free the Ontario title acquired under the British North America Act from the Indian interest and to enable the Province to enjoy the beneficial interest. In any event the precious metals belonged to the Province: *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 App. Cas. 295.

J. M. Clark, Q.C., and *R. D. McPherson*, for the defendants *Moyes, Ambrose, Brown, and Ewart*, contended that the plaintiffs had in 1894, and again by their petition in 1897, admitted that the title was vested in the Province, and having submitted their claim to the arbitrament of the Commissioner of Crown Lands were now estopped from disputing the ownership of the Province; that whatever might be said as to the land the title of the Province to the precious metals was complete as the so-called Indian title being a personal usufructuary right never extended to the royal metals; that royalties were granted to the Province by section 109 of the British North America Act: *Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767, at p. 778; *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 App. Cas. 295, at pp. 302 and 305; *The Esquimalt & Nanaimo R. W. Co. v. Bainbridge*, [1896] A. C. 561; *Woolley v. Attorney-General of Victoria* (1877), 2 App. Cas. 163, at p. 166; *Chitty's Prerogatives of the Crown* pp. 145 and 146; that the land in question had been granted to the Province

Argument.

by section 109 of the British North America Act; this had been decided in the *St. Catherine's Milling Company* case, and also that the effect of the North-West Angle Treaty No. 3, was to divest the Indian interest so that after the treaty of 1873, the title of the Province was complete and the Dominion had no power or authority to set apart Indian reserves out of Ontario lands, or in any way to oust the vested rights of the Province; that the grant of legislative power to the Dominion did not give the Dominion any proprietary rights: Lefroy on Legislative Power in Canada, p. 594; Am. & Eng. Encyc. of Law, 2nd ed., vol. 10, p. 90.

A. W. Fraser, Q.C., and W. D. McPherson, for the defendant Seybold.

Biggs, Q.C., for the defendant E. Johnston, referred to in McPherson & Clark's Law of Mines in Canada, pp. 15, 26, and 275.

December 2nd, 1899. BOYD, C.:—

Under letters patent from Her Majesty as represented by the superintendent-general of Indian affairs under the great seal of Canada in 1889 and 1890, the plaintiffs claim to be owners in fee simple of lands situate in Sultana island in the Lake of the Woods, being formerly part of the Indian reserve known as "38 B., Lake of the Woods," but now surrendered and at present known as "A. C. McMicken's mining location," containing $35\frac{1}{2}$ acres, together with all minerals, precious and base, which may be found thereon; also other parts of the Indian reserve, 38 B., now surrendered and consisting at present of other mining locations, containing in all $35 + 40 = 75$ acres of land, with all minerals, precious and base, thereon. The said lands are part of the territory surrendered to Her Majesty by and under the North-West Angle Treaty No. 3, concluded on October 3rd, 1873, between her commissioners and the Saulteaux tribe of Indians then interested therein. Under the provisions of that treaty, certain lesser reserves in the larger territory surrendered, were to be

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defined and set aside and thereafter to be administered and dealt with by the Government of the Dominion for the benefit of these Indians. It was further provided in the treaty that the said particular reserves might be sold, leased, or otherwise disposed of by the Government of the Dominion for the use of the Indians, their consent being first obtained.

Pursuant to the North-West Angle Treaty No. 3, certain officials of the Dominion, after conference with the Indians, proceeded to set apart the smaller reserve, called "38 B.," for the benefit of the Rat Portage band of Indians, members of the Saulteaux tribe. The Rat Portage band about October 8th, 1886, surrendered to Her Majesty in pursuance of the Indian Act of 1880, 43 Vict. ch. 28, some 600 acres, containing the lands now in question and being part of reserve 38 B., in trust to sell the same upon such terms as the Government of Canada might deem most conducive to the welfare of the band, and to hold the proceeds in trust for the said Indians.

This is a short statement of the history of the land in question, which at the date of Confederation formed part of the unsurveyed waste lands of the Crown in north-western Ontario marching upon the present Province of Manitoba over which the Indian occupancy then extended. By the above series of transactions, the land has been patented by the Dominion to the plaintiffs, and is now claimed by them as against the defendants, who assert title in fee simple by virtue of letters patent issued by Her Majesty under the great seal of the Province of Ontario in 1899.

It is further alleged and proved (subject to objection) by the plaintiffs that in negotiating the said treaty of 1873 the commissioners represented to the treaty Indians that they would be entitled to the benefit of any minerals that might be discovered on any of the particular reserves to be after delimited and undertook on behalf of the Crown that such minerals would be administered and sold for their use and benefit. Hence, the Government of

Canada has dealt not only with the land, but also with the minerals (of which gold forms a conspicuous part) in conveying the property in question to the plaintiffs.

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Boyd, C.

While the field of argument was somewhat comprehensive, it is enough to consider upon the present record the two main questions: (1) Whether the title in fee to the land can be validly conveyed by the letters patent issued by the Dominion; and (2) whether the Government of the Dominion has the right to deal with the minerals, especially the gold in Sultana island.

By way of clearing the ground it may be premised that the Government of the Dominion dealt with the Indians in 1873 under the supposition that all the territory being surrendered was outside of the boundary of Ontario and within the extra-provincial limits of Canada; and that in setting apart the special reserves, such as 38 B., and in accepting surrender of the part of "38 B." now in question, there was no official intervention on the part of the Province of Ontario, so that in substance the entire transaction was between the Indians interested and the representatives of the Dominion Government.

This is perhaps not very material at present, but I think it is the better conclusion not to hold Ontario as a Province bound by alleged acts of acquiescence on the part of various officers of the departments which are not brought home to or authorized by the proper executive or administrative organs of the Provincial Government, and are not manifested by any order in council or other authentic testimony. Loose and general evidence of conduct which might bind the individual, who is supposed to be on the alert to protect himself, ought not to be invoked as against a great political corporation that cannot be responsible for the acts or decisions of the many functionaries employed in the civil service: see *per* Strong, C.J., in *Black v. Reginam* (1899), 29 S.C.R., at p. 699. Agreeable to this view appears to be the condition of affairs contemplated by the two Governments in 1891, when the draft agreement proposed to be executed declared that the

Judgment. Government of Ontario was no party to the selection of the reserves, and had not yet concurred therein: see **Boyd, C.** Dominion Act, 54-55 Vict. ch. 5, p. 80; and Ontario Act, 54 Vict. ch. 3, p. 8. And since 1891 matters have remained in this regard *in statu quo*.

Proceeding now to the legal questions involved, the starting point is from the decision in *St. Catherines Milling and Lumber Co. v. Reginam* (1888), 14 App. Cas. 46. The Privy Council there decides as to the Indian hunting grounds of the interior that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a *plenum dominium* whenever that title was extinguished or otherwise surrendered (p. 55). As to the portion in Ontario, it is decided that section 109 of the British North America Act gives to each Province, subject to the administration and control of its own Legislature the entire beneficial interest of the Crown in all lands within its boundaries (p. 57).

As to the treaty of 1873 with the Indians, it is decided that the substance of that transaction was a surrender, by which the estate of the Crown was disencumbered of the Indian title, and that the benefit of that surrender accrued to Ontario (pp. 59 and 60).

As to the Dominion after the treaty it is said that Ontario, taking the benefit of the surrender, must relieve the Crown and the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty and then partly fulfilled by the Dominion Government (p. 60).

As to the meaning of the British North America Act when dealing with property in public land it is declared whenever public land with its incidents is described as "belonging to" (section 109) the Dominion or a Province, these expressions merely import that the right to its beneficial use or to its proceeds has been appropriated to the Dominion or the Province as the case may be, and is subject to the control of its Legislature, the land itself being vested in the Crown (p. 56)

As to the power of the Dominion in the case of Indians and lands reserved for Indians (section 91 (24)), it is decided that this was a bestowment of the exclusive power of legislation in order to ensure uniformity of administration as to all such lands and Indian affairs generally by one central authority, but that this was not inconsistent with the right of the Province to a beneficial interest in these lands available to them as a source of revenue whenever the estate of the Crown is relieved of the Indian title (p. 59).

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Boyd, C.

And as to the scope of "lands reserved for Indians," it is laid down that the phrase is sufficient to include all lands reserved upon any terms or conditions for Indian occupation (p. 59). That is to say, the expression is to be traced back to the Royal Proclamation of 1763, is not to be limited to reserves set apart under the provisions of a treaty, but is of larger scope covering all wild and waste lands in which the Indians continue to enjoy their primitive right of occupancy even in the most fugitive manner. But no doubt the phrase does include a treaty reserve such as "38 B." (See *Spalding v. Chandler* (1896), 160 U. S. R. at p. 403.)

Over this reserve, 38 B., the Dominion had a right to exercise legislative and administrative jurisdiction—while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the Province of Ontario. The treaty land was, in this case, set apart out of the surrendered territory by the Dominion: that is to say, the Indian title being extinguished for the benefit of the Province, the Dominion assumed to take of the Provincial land to establish a treaty reserve for the Indians. Granted that this might be done, yet when the subsequent surrender of part of this treaty reserve was made in 1886, the effect was again to free the part in litigation from the special treaty privileges of the land and to leave the sole proprietary and present ownership in the Crown as representing

Judgment. the Province of Ontario. That is the situation as far as
Boyd, C. the title to the lands is concerned.

What then is the effect of the understanding and arrangement as between the Indians and the Dominion Government acting in the surrender of 38 B. ? The Indians surrendered for the purpose of sale, and that they might enjoy the proceeds of sale as a band. The method of sale and by whom conducted was of minor moment so long as an adequate price was obtained. Upon this aspect of the case no evidence has been adduced as to any of the property under either letters patent. I assume that no complaint exists as to either sale in this regard.

As a matter of title I think no estate in fee simple could pass to the lands except from the Crown as represented by the Ontario Government. In that Province the proprietary interest was lodged freed from Indian claim by the effect of the surrender, and it does not appear to be competent for the Dominion to act in the sale and conveyance, as if the Crown held in behalf of Canada. The act of the Dominion appears to have arisen from the belief that the exclusive power to legislate as to Indian reserves given by the British North America Act conferred such plenary form of control as to amount virtually to exclusive ownership. But the Privy Council negatives that view and in a case later than the *St. Catherine's* case, the distinction is defined as carefully as seems possible by Lord Herschell in *Attorney-General of Canada v. Attorney-General of Provinces* (Fisheries case), [1898] A. C. 700. I make some extracts, "It must be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. * * There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament, proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act of 1867. Whatever proprietary rights were at the time of passing that Act, possessed by the Provinces, remain vested in them except such as are by any of its express enactments transferred to

the Dominion of Canada," pp. 709, 710. And again, Judgment.
"Whatever grants might previously have been lawfully Boyd, C.
made by the Provinces in virtue of their proprietary rights
could lawfully be made after that enactment (section 91)
came into force. At the same time it must be remembered
that the power to legislate * * does necessarily, to a
certain extent, enable the Legislature so empowered to
affect proprietary rights. * * The extent, character
and scope, of such legislation, is left entirely to the
Dominion Legislature. The suggestion that the power
might be abused so as to amount to a practical confiscation
of property does not warrant the imposition by the Courts
of any limit upon the absolute power of legislation con-
ferred. The supreme legislative power in relation to any
subject matter is always capable of abuse, but it is not to
be assumed that it will be improperly used; if it is, the
only remedy is an appeal to those by whom the Legislature
is elected. If, however, the Legislature purports to confer
upon others proprietary rights where it possesses none
itself, that in their Lordship's opinion is not an exercise of
the legislative jurisdiction conferred by section 91. If the
contrary was held it would follow that the Dominion
might practically transfer to itself property which has by
the British North America Act been left to the Provinces
and not vested in it:" *ib.*, pp. 712, 713.

I am not called upon to deal with any legislation of the Dominion relating to Indians and Indian reserves. No particular statute or enactment was pointed to as directing or justifying the issue of letters patent in this case by the Dominion. Such an Act would be a literal confiscation of provincial property and would transcend the power of the Dominion, because the proprietary right of the Province attaching upon these lands cannot be at the same time lodged in the Dominion so as to enable Canada to convey the proprietary ownership of this land to the plaintiffs.

The true method of both governments, however, appears to be not to stand at arm's length, but to engage in a joint or tripartite transaction whereby the rights of the Indians

Judgment. will be secured through the intervention of their protector,
Boyd, C. the central government, and the interests of Ontario guarded in respect to the ultimate enjoyment of the proceeds of the surrendered land in case the band of Indians cease to exist. Such a combination of parties is also desirable in order that the land may be sold to the satisfaction of the Indians and on proper terms. It is the business of the Dominion to protect the interests of the Indians and to see that the best price is obtained for the land, and so far as the price is concerned that is also the concern of Ontario. The price goes to the Dominion to be administered for the benefit of the Indians so long as a man or a successor of the tribe exists. But if any of the fund remains without any Indian claimant properly entitled, then Ontario is entitled to that residue because then the interest of the Indians will have ended and with that the right of supervision and administration on the part of the Dominion.

The question is left open in the *St. Catherine's Milling and Lumber Company* case (1888), 14 A. C. 46, as to "other questions behind," i.e., with respect to the right to determine to what extent and at what periods the territory over which the Indians hunt and fish, is to be taken up for settlement and other purposes. I infer that these rights will be transacted by means of and upon the intervention of both general and local governments, although the central government may choose to deal *ex parte* with the Indians for the extinction of their claims to land. Still it appears preferable, for the sake of the Indians themselves, as well as for present and future peace, that the allocation of particular or treaty reserves as well as the sales of surrendered lands should be upon conference with the band and with the approval and co-operation of the Crown in its dual character as represented by the general and the provincial authorities.

The Indian Act in force at the time the letters patent were granted to the plaintiff, R. S. C. ch. 43, in its enactments as to "reserves and the sale of reserves," is

appropriate to the case of public lands belonging to the Dominion of Canada, but does not seem to provide for cases like the present, where the territory is the property of Ontario. (See secs. 41 and 45, *et seq.*)

Judgment.
Boyd, C.

Somewhat different considerations apply to the right to deal with the precious metals (gold and silver) so far as the land in question is concerned. According to the law of England and of Canada, gold and silver mines, until they have been aptly severed from the title of the Crown are not regarded as *partes soli* or as incidents of the land in which they are found. The right of the Crown to waste lands in the colonies and the baser metals therein contained is declared to be distinct from the title which the Crown has to the precious metals which rests upon the royal prerogative. Lord Watson has said in *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 App. Cas., at pp. 302, 303, the sepre-rogative revenues differ in legal quality from the ordinary territorial rights of the Crown. These prerogative rights, however, were vested in Canada prior to the Confederation by the transaction relating to the civil list which took place between the Province and Her Majesty—the outcome of which is found in 9 Vict. ch. 114, a Canadian statute, which, being reserved for the royal assent, received that sanction in June, 1846. The hereditary revenues of the Crown, territorial and others then at the disposal of the Crown, arising in the United Province of Canada, were thereby surrendered in consideration of provisions being made for defraying the expenses of the civil list. So that while the Crown continued to hold the legal title the beneficial interest in them as royal mines and minerals, producing or capable of producing revenue, passed to Canada. And being so held for the beneficial use of Canada they passed by section 109 of the British North America Act to Ontario by force of site: see *Attorney-General v. Mercer* (1883), 8 App. Cas., at p. 773.

Now with these royal mines, the Indians had no concern. Whatever their claim might be to the waste

Judgment. lands of the Crown, and hunting and fishing thereon, it
Boyd, C. was never recognized that they extended to the gold and silver of the country.

Having no interest in the gold and silver they could surrender nothing. The Dominion Government in dealing with these particular Indians in 1873, had no proprietary interest in the gold and silver and could make no valid stipulation on that subject with the Indians which would affect the rights of Ontario. The Indians are not in any way represented in this litigation, and I do not and could not prejudice their claims against any government by what I now decide. The stipulations on the face of the treaty do not deal with the precious metals, but even if it is competent to go behind the treaty, still it remains that the Indians had no interest, and the Dominion had no competence *quoad* these royal mineral rights. It would appear, therefore, to be a proper result from this state of affairs that while the Dominion would be interested in seeing that a proper return was obtained for land and baser minerals—they would have nothing to say as to the terms and price for which the Province should dispose of the precious minerals.

My conclusion in the matter of title is in accord with the opinion of Mr. Justice Rose as expressed in the unreported case of *Caldwell v. Fraser*, * and is not at variance with the judgment of the Court of Queen's Bench in Quebec in *Attorney-General of Canada v. Attorney-General of Quebec* (1897), Q. O. R. 6 Q. B. 12.

For reasons given in the foregoing pages, I think the plaintiffs' action should be dismissed with costs—the letters patent issued by the Dominion being invalid.

A. H. F. L.

* See McPherson & Clark's Law of Mines in Canada, at p. 15; Amer. & Eng. Encycl. of Law, 2nd ed., at p. 91.—REP.

MCQUILLAN V. THE MUNICIPAL COUNCIL OF THE TOWN OF ST. MARY'S.

Municipal Corporation—Notice of Action—Defective Sidewalk—Particulars.

A notice of action against a municipal corporation of a claim arising out of a defective sidewalk is sufficient if it state the cause of the accident together with the name of the street and the particular side of the street and reasonable information as to locality so as to enable the corporation to investigate. It is not necessary to mention the exact locality.

THIS was an action for negligence brought against the defendants to recover damages for an injury alleged to have been sustained by the plaintiff under the circumstances mentioned in the judgment. Statement.

The trial took place at Stratford, before MACMAHON, J., without a jury, at the Autumn Assizes, 1899.

Mabee, Q.C., for the plaintiff.

Idington, Q.C., for the defendant.

December 13th, 1899. MACMAHON, J. :—

Action brought to recover damages for injuries sustained by the plaintiff on the 5th April last, while walking on the south side of Queen street in the town of St. Mary's, he having slipped on a quantity of snow and ice which it is alleged the defendant corporation had negligently allowed to accumulate and form upon the walk causing him to fall.

The plaintiff, having on the day in question made a purchase in Carter Son & Co.'s store, which is on the south side of Queen street, was proceeding west towards his home, and when about twenty feet from the door of Carter's store and opposite Teskey's barber shop, he slipped and fell on the ice, dislocating the wrist of his right hand, and has been practically unable to earn wages at his employment as a labourer ever since.

The pavement in front of Carter Son & Co.'s and Teskey's shops is of asphalt, and there is a considerable incline in

Judgment. the pavement towards the west, and also a slight incline
MacMahon, towards the outer edge of the walk.

J.

There was no by-law of the corporation requiring the occupiers to clear the snow in front of their premises.

There was no ice in front of Carter Son & Co.'s shop, but there were from five to six inches of ice in the middle of the walk in front of the barber shop, the ice being considerably higher in the centre than on either the inner or outer side of the walk. The shop occupied by Teskey is in a two-story building, the second story being occupied as a photographer's gallery and having a large sky-light in the roof, upon which it was said that during a snow storm quantities of snow lodged, which, as it melted, fell on the pavement, and by the alternations of thawing and freezing, the ice accumulated on the walk in front of Teskey's shop.

Richard Lucas, employed by the town as foreman of public works, whose duty it was to look after the sidewalks said he sprinkled sand on the walk in front of Teskey's shop on Sunday the 12th of March, but not after that date. Between the 21st and the 28th of March, ten inches of snow had fallen, and according to the evidence of William Logan, —a fair and impartial witness,—who was employed in Teskey's shop, and who chopped the ice from the walk a few days after the plaintiff was injured, the ice was about six inches thick in the centre, sloping to two inches at the sides, and had been there for some considerable time before the accident.

The place where the plaintiff fell is on the principal business street, and between the two principal hotels in the town, and is a leading thoroughfare for pedestrians. I therefore reach the conclusion that the corporation was guilty of gross negligence in permitting a large body of snow and ice to accumulate and remain for such a length of time on such a thoroughfare.

Objection was taken by counsel for the corporation to the notice of the accident as being insufficient, as it described the accident as having taken place opposite the store occupied by Carter Son & Co., when in fact it was opposite

Teskey's shop. As already pointed out, the plaintiff fell about twenty feet from the door of Carter Son & Co.'s store, or about eight feet from the west corner of the building occupied by them. The statute R. S. O. ch. 223, sec. 606, sub-sec. 3, requires "notice in writing of the accident and the cause thereof." It is not necessary, under the statute, to mention the exact locality. What is required is that the notice should state the cause of the accident, that is, whether caused by a hole in the walk, by a defective plank, by a fall occasioned by accumulation of ice on the walk, etc., which, together with the name of the street, and the particular side of the street, and reasonable information as to locality so as to enable the corporation to investigate, is all that can be called for.

Judgment.
MacMahon,
J.

There will be judgment for the plaintiff for \$300 and costs.

A. H. F. L.

TURTLE ET AL. V. TOWNSHIP OF EUPHEMIA.

Ditches and Watercourses Act—Award—Engineer—Appointment—Revocation—Notice—Jurisdiction—Estoppel—Appeal.

By sec. 4 (1) of the Ditches and Watercourses Act, R. S. O. ch. 285, it is provided that "every municipal council shall name and appoint by by-law (Form A.) one person to be the engineer to carry out the provisions of this Act, and such engineer shall be and continue an officer of such corporation until his appointment is revoked by by-law (of which he shall have notice) and another engineer is appointed in his stead, who shall have authority to commence proceedings under this Act or to continue such work as may have been already undertaken."

The defendants' council duly appointed R. such engineer, and he accepted the office. Subsequently they, without any notice to him, and without any by-law expressly revoking his appointment, duly passed a by-law purporting to appoint S. as such engineer; the latter by-law in no way referring to the former or to R.:

Held, that the prior appointment had not been revoked; that S. did not become "the engineer;" and that an award purporting to be made by him as such engineer under the Act was invalid.

S. was not *de jure* the engineer, because R.'s appointment had not been revoked by by-law, either with or without notice to him; nor could the defendants assert that S. was *de facto* the engineer, for he had not the reputation of being the engineer.

Quære, whether the notice required is one of intention to revoke or of having revoked.

Held, also, even supposing that consent could confer jurisdiction, or that the plaintiffs might waive or be estopped from urging an objection to S.'s jurisdiction, that there was no reasonable evidence of any such consent, waiver, or estoppel; for the plaintiffs' requisition called for "the engineer," and they were ignorant that R. had not been properly superseded. The point was raised upon an appeal against the award and was overruled; but, as it went to the root of the jurisdiction of the whole proceedings, including such appeal, there was nothing in such proceedings which could prevent a consideration of the question now.

Statement.

THIS was an action brought to enjoin the defendants from enforcing an award made by one Angus Smith, purporting to act as the engineer of the defendants, the corporation of the township of Euphemia, under the Ditches and Watercourses Act, in respect to a ditch adjacent to the respective lands of the plaintiffs in the township, and to compel them to provide means for carrying away the water descending through a road side ditch, and for damages for injuries sustained by reason thereof. The facts are stated in the judgment.

The action was tried at Sarnia before MEREDITH, J. without a jury, on the 27th November, 1899.

T. G. Meredith and *Dromgole*, for the plaintiffs.

W. J. Hanna, for the defendants.

Judgment.

Meredith, J.

February 8, 1900. MEREDITH, J.:—

The plaintiffs attack an award purporting to have been made under and pursuant to the provisions of the Ditches and Watercourses Act; and their first contention is that it was not made by any person authorized by law to make such an award: and if they be right in that contention the award is invalid and entirely without legal force or effect, and none of the saving clauses of the Act can help it; unless, indeed, these plaintiffs be in some way precluded from the benefit of such contention. The power to make any such award is wholly statutory, and, unless made by the person empowered to make it, is not an award under the Act at all. The objection is a formidable one.

Then, was the award made by a person unauthorized to make it?

The Act provides that it shall be made by one person to be named and appointed by the municipal council to be the engineer in their municipality to carry out the provisions of the Act; that the municipal council shall by by-law name and appoint such engineer, and that he shall be and *continue* an officer of the corporation *until his appointment is revoked by by-law (of which he shall have notice)* and another engineer be appointed in his stead.*

The municipal council of the defendants appointed James Robertson such engineer, in manner provided by the Act, on the 27th day of April, 1895; and he accepted the office and acted and continued in it.

On the 12th day of February, 1898, they, without any notice to such engineer, and without any by-law expressly revoking his appointment, passed a by-law purporting to appoint Angus Smith as such engineer; in both cases of appointment using the form prescribed by the Act; the

* The Ditches and Watercourses Act, R. S. O. ch. 285, sec. 4 (1).

Judgment. latter by-law in no way referring to the former or the
Meredith, J. engineer appointed by it.

The main question is : Has the first appointment been revoked, as the Act expressly requires ? If not, the plain words of the Act are that James Robertson is and continues in office ; and so Angus Smith never became " the engineer."

Everything turns upon the meaning of the enactment ; the case in this respect is not one depending, in any sense, upon any common law rights or rules. The Legislature has said who is to be and continue the engineer, and the Act alone must be looked to to find out which of these two persons is *de jure* the engineer, for there can be but " one person " who is " the engineer : " sec. 4.

Clearly and admittedly James Robertson was the engineer ; and, clearly and admittedly, if his appointment has not been revoked by by-law (of which he has had notice) he is and continues such engineer : the plain words of the Act require it.

So that it comes down to this : Can the revocation by by-law (of which the engineer shall have notice) be by implication arising from the passing of a by-law purporting to appoint another to the office, in form as if the office was vacant ; and does any such implication arise ? That is, it comes down to this apart from any question as to notice of the by-law.

Now, the words of the Legislature are : " Shall be and continue * * until his appointment is revoked by by-law (of which he shall have notice) and another engineer is appointed in his stead : " that is, appointed, as the Act before provides, by by-law (form A.).

The three things are expressly required : revocation by by-law, notice, and the appointment by by-law of another " in his stead."

The revocation by by-law of which there has been notice is not enough ; he still continues in office until another is appointed in his stead.

Have I any right to say that the mere appointment of

another is sufficient? The Legislature has not said so; its first requisite is revocation by by-law of which, there shall be notice. Can I rightly disregard that, and hold it to be of no effect? Can I rightly hold that the Act may be read as if those provisions were completely blotted out, as if the only requirement were the appointment of another by by-law? That must be done if Angus Smith is *de jure* the engineer. There is no escape from it.

Judgment.
Meredith, J.

Now, whatever notions I might have of the necessity for, or wisdom of, that which the Legislature in plain words provides, I must give effect to it. I have no right to adjudicate away any part of an enactment because it might seem to me needless. And I would go further and say, that where the Legislature has provided for revocation by by-law, notice, and an appointment by by-law, I have no right to say that the first is included in the last, and therefore it was a waste of words to provide for the first; but rather, if ordinarily that might be said, I ought to consider that the Legislature intended them to be treated as separate and distinct things under this Act.

It is surely but right to give the persons who made this law credit for both knowing and saying that which they meant, and saying no more than they meant.

And the facts of this particular case, in my judgment, shew that there was no waste of words, but that the three requirements of the Act were not unwisely provided.

The facts I refer to are these: Mr. Robertson had been for several years the engineer; the municipal corporation was in respect of its roads directly and considerably interested in the drainage in question; they had in the year 1897 initiated proceedings under the Act in respect of this drainage; and in those proceedings this engineer made an award which was not in accordance with the wishes of the municipal council; that award was for some technical defect set aside in June of that year; in February following the by-law appointing Mr. Smith was passed, and in July following his award was made on proceedings initiated by the plaintiff Turtle—an award requiring the

Judgment. construction of a drain commencing not upon the plaintiffs' land but upon the defendants' highway, and running along that highway more than half its distance, doing the work of a road ditch and taking water by the road side ditch a distance from the point of commencement greater than the Act permits to be assessed for benefit so derived : a course entirely different from Mr. Robertson's, and one quite in accordance with the wishes of those who had so recently appointed Mr. Smith in Mr. Robertson's place, or intended and endeavoured to do so.

Meredith, J.

Where persons have the power of appointment of the judges of their own cases, every prerequisite to such an appointment may, by their opponents, be fairly considered a matter of something more than mere form.

It is begging the question to say that the appointment of Mr. Smith to the single office of engineer must necessarily have ousted Mr. Robertson from that office ; for the question is : Has Mr. Smith ever been duly appointed ; has he ever become the engineer ?

It does not require authority for the proposition that where an office is held during will or pleasure the appointment of another to that office is a sufficient expression of the determination of the will or pleasure under which theretofore it had been held : a sufficient determination of all right of the person theretofore holding under such will or pleasure. But Mr. Robertson did not hold office at the mere will or pleasure of the municipal council ; it was by virtue of the enactment, by the mandate of the Legislature, that he was continued in that office until the three things before mentioned were done ; and not having been done, the attempt to appoint Mr. Smith was futile, in my opinion.

Other enactments of the same Legislature seem to me to support the views I have expressed as to this enactment ; the Municipal Act provides (sec. 282) that every council shall appoint a clerk and (sec. 288) a treasurer and (sec. 295) assessors and collectors and (secs. 299 and 300) auditors ; and (sec. 321) that all officers appointed by the

council shall hold office until removed by the council. So that such officers hold office at the pleasure of the council, and in cases where the appointment should be made annually, but is not, the last mentioned section prevents a vacancy until action is taken by the council. Section 300 expressly provides that the Toronto auditors shall hold office during the pleasure of the council; and sec. 8, sub-sec. 28, of the Interpretation Act provides that all officers appointed by the Lieutenant-Governor shall hold office during pleasure only. The difference in the language of the Act in question shews that the tenure of the engineer is to be something different. If sec. 321 of the Municipal Act applies to him, it must be that in his case the office shall be held until he is removed by the council in manner provided for in the Act in question, that is, by by-law revoking his appointment, of which he shall have notice, and by by-law appointing another in his stead: so giving full effect to both Acts. Judgment.
Meredith, J.

I have spoken fully upon the absence of a by-law revoking Mr. Robertson's appointment; and shall now add a few words on the want of notice of such a by-law.

In the first place, it will be observed that it is not notice of the appointment of another that is required; the appointment of another is expressly required, and it must be by by-law, but no notice of it is required or mentioned; the three things are treated as separate and distinct, a by-law of revocation, and notice, and then a by-law of appointment.

Now, it does not seem quite clear to me whether the notice is of intention to revoke or of having revoked the appointment; the more literal reading of the section points to the latter, but there is very much to be said in favour of the former; having regard to the works upon which the engineer may be engaged at the time, and also to the power of the municipal council to appoint even where the municipal corporation is directly interested in the work, it may well have been thought that there should be some hearing by the council of objection to their proposed

Judgment. action, if any, before they could exercise the power conferred on them. But, however that may be, I have found as a fact that no notice of the by-law in question was given to Mr. Robertson. In the spring of the year (1898) he acquired some knowledge of it, probably through the newspapers, and afterwards during that season had some conversation with the township clerk in a casual way upon the subject; but no written notice was ever given to him; and, if verbal notice would do, I cannot consider such knowledge so acquired as equivalent to notice: see *The Queen v. Saddlers Co.* (1863), 10 H. L. C. 404; *Hill v. The Queen* (1852-4), 8 Moore P. C. 138; and *Vernon v. Corporation of Smith's Falls* (1891), 21 O. R. 331.

In my opinion, Mr. Robertson continued and Mr. Smith was not *de jure* the engineer under the Act when the award in question was made.

Then, can the defendants say that Mr. Smith was at all events *de facto* the engineer? If so, this attack upon the award must fail, for it would be intolerable if such an act of such a public officer would invariably depend for its legality upon the regularity of his appointment. And this consideration is at first sight very apt to prepossess one in favour of the defendants upon this branch of the case; but second thoughts make it very plain to me that this principle cannot be applied in the defendants' favour; that they, at all events, cannot assert that Mr. Smith was *de facto* the engineer. In order that that character can be established it is first necessary, in such a case as this, that the man should have had the reputation of being the engineer. How can those who so recently attempted to appoint him say that he had the reputation of being the engineer? They are supposed to have known the law, and they knew the fact that Mr. Robertson's appointment had not been revoked, and they probably knew that no notice was given, and that Mr. Smith's appointment was not made in his stead; for they seem to have treated the office as vacant at the end of each municipal year and to have passed a by-law each year filling the vacancy all through

Mr. Robertson's term, as well as when they attempted to appoint Mr. Smith.

Judgment.

Meredith, J.

It is a great pity that none of the council nor the clerk took the trouble to read the Act; for if they or he had, it is highly probable that they would have done just what the Act literally requires, and to avoid any difficulty would have given the notice both before and after passing the by-law. It is very improbable that any of them would have had that little knowledge which would have made it dangerous to have thought, and procured action upon the idea, that under this Act a by-law appointing is also a by-law revoking, and that notice is immaterial.

I am of opinion that these defendants cannot support the award on the ground that it was made by one who was *de facto* though not *de jure* the engineer: see *Rex v. Corporation of Bedford Level* (1805), 6 East 356, and *Speers v. Speers* (1896), 28 O. R. 188.

These seem to me to be the main features of this branch of the case, though little, if at all, relied upon in the argument for the defendants.

Mr. Hanna's substantial contention was that there was a waiver of this objection to the award; and that the plaintiffs were estopped by their conduct from raising it.

It has been said that there cannot be any estoppel in such a case as this, where there is a complete want of jurisdiction, and of course consent cannot (unless it is so provided) confer jurisdiction, though it has always seemed to me quite reasonable to say that, though consent cannot confer jurisdiction, a party may yet be estopped from shewing want of jurisdiction, that is, he may be precluded from raising the point.

But, assuming that consent could confer jurisdiction, and that the plaintiffs might waive, or be estopped from urging, the objection; there is no reasonable evidence of any such consent, waiver, or estoppel against either plaintiff—very certainly none against the plaintiff Elliott.

The plaintiff Turtle's requisition called for "the engineer;" it was the act of the township clerk that brought in

Judgment. Mr. Smith instead of Mr. Robertson ; this plaintiff had nothing to do with that ; the blame rests with the council and the clerk, if he were not the engineer. Neither plaintiff knew who was the engineer ; they had no doubt heard that Mr. Smith had been appointed ; but there is nothing whatever to shew that they knew, or either of them knew, that Mr. Robertson's appointment had not been revoked by by-law of which he had had notice. The point was raised upon the appeal against the award and was overruled ; but, as it goes to the root of the jurisdiction of the whole proceedings, including the proceedings on the appeal, neither that opinion nor anything in the appeal proceedings can prevent a consideration of the question now.

Meredith, J.

Upon this first ground of attack upon the award the plaintiffs must, in my judgment, succeed, and it therefore becomes unnecessary for me to consider any other of the several objections made against its validity.

The defendants will, accordingly, be restrained by perpetual injunction from enforcing the award against the plaintiffs.

The defendants being unprepared to meet the other branch of the plaintiffs' claim at the trial, it was there agreed, between the parties, that there should be a reference to the proper local officer of all matters in question between the parties therein. It will, therefore, be referred to the local Master at Sarnia to ascertain and state what, if any, damages the plaintiffs or either of them have or has sustained by reason of the matters complained of in the 4th, 5th, and 6th paragraphs of the plaintiffs' statement of claim, and whether or not the plaintiffs, or either of them, should have any, and if any what, injunction in respect thereof.

If the plaintiffs elect to take a reference, further directions and all questions of costs of the reference will be reserved until after the Master has made his report.

If a reference, the plaintiffs will have their costs of the action in any event, other than the costs reserved ; if no

reference, they will have their costs of the action forth- Judgment.
with. Meredith, J.

Before parting with this case it may not be amiss to suggest to the parties the imagination of the substantial and effective system of drainage which the amount expended in the costs of this action might have procured for them: or the still more handsome structure (a sort of miniature Thames embankment in earth) which the amount which must yet be expended in costs would buy if the case go on through the several stages of appeal open to it; nor to add that, no matter what the eventual outcome of the litigation, they might find it more profitable to have a new award made by a competent and impartial engineer—one who has not expressed or formed any opinion upon the subject yet—to be duly appointed by the defendants' council.

E. B. B.

[DIVISIONAL COURT.]

TRUSTS AND GUARANTEE COMPANY V. HART.

Gift—Parent and Child—Fiduciary Relationship—Influence—Presumption—Onus—Absence of Independent Advice.

For fifteen years before his father's death the defendant managed his father's business generally, and did all his banking under a power of attorney. After the death of the father, at the age of 78, in September, 1898, the son claimed a sum of \$20,000, represented by a bank deposit receipt dated 3rd June, 1898, payable to himself, which he alleged was a gift from his father to himself or his children, and which he obtained by drawing as his father's attorney a cheque for the amount in his own favour upon his father's account. The father died intestate, leaving the defendant and two other children. The sum of \$20,000 represented more than one-fourth of the value of the estate. The trial Judge found that the amount was a gift to the defendant's children, and ordered it into Court for their benefit:—

Held, reversing that judgment, that, on grounds of public policy, the presumption was that the gift, even though freely made, was the effect of the influence induced by the confidential relationship which existed, and the onus was on the defendant to shew that his father had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances.

Morley v. Loughnan, [1893] 1 Ch. 736, *Rhodes v. Bate* (1865), L. R. 1 Ch. 252, and *Liles v. Terry*, [1893] 2 Q. B. 679, followed.

The rule is not confined to the case of trustee and *cestui que trust*, but is applicable to every case where confidence has been reposed, and the fact that the benefit obtained has not been so obtained for the personal benefit of the person in whom the confidence was reposed, does not affect the application of the principle.

Evidence was given to the effect that the deposit receipt was taken in the defendant's name in lieu of a promissory note made by the father in 1895, which itself was a renewal of an earlier note made in favour of the son as a settlement for his children, and that both notes had been destroyed:—

Held, that the notes, if they existed at all for the purpose alleged, were incomplete gifts, not binding upon the deceased or his estate. The hand by which the transfer of the \$20,000 was effected was that of the son, and the ratification rested almost wholly upon the evidence of the son and his wife, who kept the matter a secret until after the death. The father at the time the transaction was carried out in June, 1898, was not legally bound to pay his note; he was ill and old; and the only adviser to whom he had recourse was the defendant. Therefore, that time, and not the time when the notes were said to have been given, was the time at which the gift must be taken to have been made, if at all, and at which the effect of the lack of independent advice was to be considered.

Statement. THIS was an action by the administrators of the estate of James Hart, deceased, to recover the sum of \$20,000, which it was alleged the defendant George D. Hart, a son of the deceased, appropriated to his own use out of the

assets of the business of a general store which the deceased [Statement. carried on at the town of Picton, and which the defendant George D. Hart, for many years before the death of his father, managed under a power of attorney. The defendant George D. Hart alleged that the money (represented by a deposit receipt in his favour issued by the defendants the Standard Bank of Canada) was a gift from his father to himself or to his children. The facts are stated in the judgment.

The action was tried at Picton, by MEREDITH, J., who found that a gift to or settlement upon the children of the defendant George D. Hart was established by the evidence, and ordered that they should be added as parties, and the money paid into Court for their benefit, and dismissed the action without costs.

From this judgment the plaintiffs appealed, and the defendant George D. Hart made a cross-appeal on the question of costs.

The appeals were heard by ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., on the 9th and 10th November, 1899.

Osler, Q.C., and *E. M. Young*, for the plaintiffs. There was fairly strong evidence of the existence of a promissory note, but not of its being intended as a gift to the defendant's children. There was no consideration for the note, no interest was collected, and there was no presentment for payment. The note cannot support the subsequent transaction, and the evidence does not establish a gift: *In re Whitaker* (1889), 42 Ch. D. 119; *Cochrane v. Moore* (1890), 25 Q. B. D. 57; *Lyte v. Peny* (1542), 1 Dyer 49a; *Gason v. Rich* (1886), 19 L. R. Ir. 391; *Morley v. Loughnan*, [1893] 1 Ch. 736, 752.

Aylesworth, Q.C., and *C. H. Widdifield*, for the defendant George D. Hart and the infant defendants. It is not pretended that there was any consideration for the note, but the defendant had worked for his father for years, and it was intended by the note to settle the amount which should be devoted to the benefit of his children. There

Argument. was no reason why the deceased should not settle a sum of money upon his grandchildren, and the evidence is amply sufficient to support the settlement: *Green v. McLeod* (1896), 23 A. R. 676; *Sherratt v. Merchants Bank of Canada* (1894), 21 A. R. 473; *Haigh v. Brooks* (1839), 10 A. & E. 309, 319, 320.

R. Wardrop, for the defendants the Standard Bank of Canada, asked for costs.

Osler, in reply, referred to the cases collected in *Sherratt v. Merchants Bank of Canada*, 21 A. R. 473.

February 12, 1900. STREET, J.:—

The defendant George D. Hart had acted from the year 1883 down to the time of the death of his father, the deceased James Hart, in September, 1898, as the manager of his business at the town of Picton. In 1887 George married, and he and his wife and the deceased from that time forward, with the three children who were born of the marriage, lived together at the back of or over the shop of the deceased until his death. The deceased had been ill for two years before his death, but it was not until about the 24th May, 1898, that his illness became serious and acute. The defendant George D. Hart transacted the whole of the banking business of his father from 1883, under a power of attorney under seal authorizing him to sign cheques and accept and sign drafts, bills of exchange, and all other documents necessary for conducting his father's business with the Standard Bank at Picton. He had the entire control and handling of the cash, and took what he wished for the use of himself and his family, without rendering any account to his father, who appears to have trusted him implicitly. The deceased had two other children, a son James, who had a shop at a place called Demorestville, and a daughter Mrs. Bongard, who also lived away from him. The manager of the Standard Bank, where the account of the deceased was kept, stated that he had been manager at Picton for eleven years, and

that in that time, although his office was only two doors from the shop of the deceased, he had never signed cheques upon his own account—all had been drawn by George under the power of attorney.

Judgment.

Street, J.

After the death of his father, George claimed a sum of \$20,000, represented by a deposit receipt of the Standard Bank, payable to himself, bearing date on 3rd June, 1898, which he alleged was a gift from his father. The money represented by this deposit receipt had been at the credit of the deceased in the Standard Bank in the shape of a deposit receipt for \$17,000, and accrued interest and cash at the credit of his current account, down to the 3rd June, 1898, when the defendant George, purporting to act under the power of attorney from his father, had surrendered the deposit receipt, the amount of which with the accrued interest was then placed to the credit of the deceased. George then drew a cheque payable to himself, for \$20,000, signed his father's name to it under the power of attorney, and handed it to the bank, who then at his request issued a new deposit receipt, payable to George, for the \$20,000.

This transaction does not appear to have been known to any person outside the bank manager, George, and his wife, until after his father's death. George sent for his brother James a fortnight before the father's death for the special purpose of discussing the desirability of a settlement of the father's affairs, in view of his approaching death, and in the discussion which then took place between the brothers, both in the presence of and in the absence of the father, the fact of this gift was not made known to James, and the proposed arrangement of the affairs of the father was discussed by James in ignorance of any such transaction. No settlement was in fact arrived at, and the father died intestate. The present plaintiffs were appointed administrators of his estate, and the transaction was first brought to light when George was asked for and produced his father's bank book containing the entries of the transaction, which was then, and afterwards upon his examination for discovery, stated by George to have been for his

Judgment.

Street, J.

own benefit; but upon the trial he stated that it was for the benefit of his three children, and not for himself at all. Upon each occasion, however, he stated that the transaction which ended in the gift to him of the deposit receipt began in December, 1889, when he says that his father made a note to him for \$20,000 payable three days after date. The account he gave at the trial, and upon which the learned Judge who tried the case acted, was that this note was given to him not for his own benefit, but as a settlement for his children, with regard to whose future he himself had expressed some anxiety, to relieve which his father, declaring his own desire to see them provided for, at once drew and gave him the note in question. George further stated throughout that this note remained in his wife's possession until December, 1895, when he called his father's attention to the fact that it was almost outlawed, whereupon his father gave him a new note for the same sum, in the same form, and destroyed the original note. He says that the new note likewise remained in his wife's custody until the 3rd June, 1898, when his father directed him to take the deposit receipt in his own name in lieu of it, and that when he had carried out this direction the second note was likewise destroyed. This story was corroborated in all its details by George's wife; and a clerk who had been employed in the shop gave evidence that at the time the second note was given he had happened to see it lying on a desk after it had been signed by the deceased, and before it had been seen by George. There was no other evidence that the notes in question had ever been seen by any person. There was, however, the evidence of several persons to whom the deceased had stated, when they applied to him to borrow money or for similar purposes, that George held his note for a large sum or for \$20,000, which he had to pay.

The learned Judge, at the conclusion of the evidence, treated the question before him entirely as a question of fact, and, having come to the conclusion that the evidence of George as to the existence of the note had been suffi-

Judgment.

Street, J.

ciently corroborated by independent evidence, ordered that the infant children of George should be made parties, and declared that the \$20,000 belonged to them and ordered it into Court in their names.

The argument that has taken place before us has led me to the conclusion that the case should be dealt with upon other grounds, and that the existence or non-existence of the alleged notes is not in reality the vital question in the case.

The evidence disclosed beyond any question that the defendant George occupied for many years before the death of his father a highly confidential relation with regard to him; he was his trusted agent and manager, having in his hands the fullest control of his affairs. His transactions were, no doubt, to some extent overlooked by his father, and the records kept of them were always open to and were from time to time more or less carefully supervised by his father. But there was the fullest authority given the son and the fullest trust reposed, to the extent which would have enabled the son to have carried out the transaction which is here impeached, even without the authority of his father, subject of course to the possibility of its being discovered when next his father made a sufficiently careful examination of the bank book to have seen the entries.

The law applicable to the undisputed relation in which father and son stood to one another, and the circumstances under which this large sum of money came into the possession of the son, is thus set forth in the late case of *Morley v. Loughnan*, [1893] 1 Ch. 736, at p. 752: "Or the donor may shew that confidential relationship existed between the donor and the recipient, and then the law on grounds of public policy presumes that the gift, even though in fact freely made, was the effect of the influence induced by those relations, and the burthen lies on the recipient to shew that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances."

Judgment.

Street, J.

The remarks of the Court in *Rhodes v. Bate* (1865), L. R. 1 Ch. 252, are to the same effect. Turner, L. J., says, at p. 257: "I take it to be a well established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others have conferred upon them, unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the Court, and I do not think that either the age or the capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle:" and he then proceeds to say that the principle cannot be treated as applicable in its full extent where the gift or benefits in question are trifling in amount.

In the present case the gift of \$20,000 appears to represent between one-third and one-fourth of the whole value of the property of the deceased.

The law as laid down in these cases has been again enunciated by the Court of Appeal in England in *Liles v. Terry*, [1895] 2 Q. B. 679.

The only question that can be raised here is whether a confidential relation existed between the parties; and of that, from the facts I have referred to, it seems to me there can be no doubt. The rule has not been confined to the more common and obvious cases of trustee and *cestui que trust*, but has been treated as applying to every case where confidence has been reposed.

In *Rhodes v. Bate*, above referred to, for instance, the defendant, although a certificated conveyancer, was brought within the operation of the rule through his having acted for the plaintiff in the examination of the accounts of the trustees under her father's will. The Courts, in fact, have refused to fetter themselves by attempting an enumeration of the description of cases in which the principle will be applied: *Dent v. Bennett* (1839), 4 My. & Cr. 269; *Coulson*

v. *Allison* (1860), 2 DeG. F. & J. 521; *Harvey v. Mount* Judgment.
 (1845), 8 Beav. 439; *Wheeler v. Sargeant* (1893), 3 R. 663: Street, J.
 and the fact that the benefit obtained has not been so
 obtained for the personal benefit of the person in whom the
 confidence was reposed, does not affect the application of
 the principle: *Allcard v. Skinner* (1887), 36 Ch. D. 145,
 160.

In considering the case it is not to be lost sight of
 that the notes, assuming them to have existed as instru-
 ments intended to be binding between the parties,
 were not instruments upon which any recovery could
 have been had by George or his children, either against
 the deceased or his estate, because of the absence of
 a consideration to support them: *In re Whitaker*
 (1889), 42 Ch. D. 119. They were, if they existed at all
 for the purpose alleged, mere incomplete gifts, not bind-
 ing upon the deceased or his estate. Then, the hand by
 which the transfer of the \$20,000 from the credit of the
 father to that of the son was effected was the hand of the
 son and not of the father, and the ratification of the act by
 the father rests almost wholly upon the evidence of the
 son and his wife, who kept the matter a secret until after
 the death of the father. The father at the time the trans-
 action was carried out on the 3rd June, 1898, was not
 legally bound to pay his note; he was ill and was 78 years
 of age; and the only adviser to whom he had recourse was
 the defendant. I think that, and not the time when the
 notes are said to have been given, is the time at which the
 gift must be taken to have been made, if at all, and at
 which the effect of the lack of independent advice is to be
 considered.

In my opinion, the appeal, for the reasons I have given,
 should be allowed with costs, including those of the infants
 and the bank, and the defendant George Hart should be
 ordered to pay to the plaintiffs the \$20,000, with the
 interest accrued upon it, and the costs of the action and
 the costs of the bank.

Judgment. ARMOUR, C. J. :—

Armour, C. J.

I agree with the judgment of my brother Street, and have only to add that, apart from the question of law, I am not convinced beyond reasonable doubt by the evidence that there ever was a gift by the father to the son of the money in question.

FALCONBRIDGE, J. :—

And I agree in the result.

E. B. B.

[DIVISIONAL COURT.]

HARPER V. TORONTO TYPE FOUNDRY COMPANY.

Replevin—Indemnity of Defendant—Replevin Bond—Consolidated Rule 1074.

The Consolidated Rule 1074, dealing with the question of indemnity of the defendant in replevin proceedings, is the Statute 48 Vict. ch. 13, sec. 8 (O.) imported into the Rules, and does not give an independent cause of action, merely adding another condition to the replevin bond required to be taken by the sheriff.

Statement. THIS was an action tried before ROBERTSON, J., with a jury, at Peterborough, on the 5th April, 1899.

The plaintiff was a printer and carried on business in Peterborough under the name of Harper & Co. He had purchased a printing plant, consisting of presses and the usual stock in a printing office. The defendants, who were manufacturers and dealers in printers' supplies, claimed to be entitled to the possession of the plant under certain lien agreements, under which they alleged \$500 was due them; and threatened that unless the sum was forthwith paid they would immediately seize and carry the plant away. The plaintiff denied that the defendants had any such lien, and in consequence of the defendants' threats, and to prevent, as he

said, the defendants' taking the plant, he closed up his place of business. The defendants thereupon commenced an action against the plaintiff, and obtained an order of replevin, and, with the delivery of the replevin order, also delivered to the sheriff the usual replevin bond to prosecute the action with effect and without delay, and to repay to the plaintiff such damages as he might sustain by the replevin proceedings. The plaintiff then obtained an order allowing the payment into Court of \$400, which was to stand in the place of the goods sought to be replevied, and on payment thereof all proceedings under the replevin order were to be stayed. The \$400 was duly paid into Court. The defendants, it appeared, procured the sheriff's delivery back to them of the replevin bond. Statement.

The replevin action came on for trial before MACMAHON, J., who delivered judgment, declaring that the agreements under which the defendants claimed to be entitled to the said plant had been fully satisfied.

The plaintiff then brought this action claiming that he had suffered damage by reason of the issue of the replevin order, and that, apart from the bond, he was entitled by virtue of Consolidated Rule 1074,* to maintain an action to recover such damages.

At the close of the evidence the learned Judge reserved his decision, and subsequently gave the following judgment:—

* "1074. Where an order for replevin is issued for any property which had not been previously taken out of the plaintiff's possession, for which the plaintiff might formerly have brought an action of trespass or trover, the defendant shall be entitled, if the plaintiff fails in the action, to be fully indemnified against all damages sustained by the defendant, including any extra costs which he may incur in defending the action; and the bond to be taken by the sheriff or bailiff shall be conditioned, not only as heretofore required but also to indemnify and save harmless the defendant from all loss and damage which he may sustain by reason of the seizure, and of any deterioration of the property in the meantime, in the event of its being returned, and all costs, charges, and expenses, which the defendant may incur, including reasonable costs not taxable between party and party. This Rule shall not apply to cases of distress for rent or damage to a tenant."

Judgment. ROBERTSON, J.:—

Robertson, J.

I reserved judgment after hearing all the evidence and the respective arguments of counsel, and having fully considered the same, I have come to the conclusion that the plaintiff is not entitled to recover in this action. There was in fact no replevin of the plaintiff's goods, and his business premises were closed against the sheriff by the act of the plaintiff, and any damage he suffered was in consequence of his own act and in preventing the sheriff in executing the order of the Court.

I am therefore obliged to dismiss the action.

The plaintiff then appealed to the Divisional Court.

On December 11, 1899, before a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ., the appeal was argued.

Poussette, Q. C., for the appellants. The plaintiff has the right to maintain this action to recover damages under Consolidated Rule 1074. The Rule has the force of a statute. The action is maintainable under the Rule, apart from the replevin bond. It is only necessary to look at the form of the bond and the rule, to shew that the damages are properly claimed. The rule provides that the plaintiff can recover any damages he has sustained by reason of the replevin action. It then goes on to refer to the indemnity recoverable under the bond. The two causes of action are distinct.

Ryckman, contra. The only action maintainable is on the bond. There is no independent action as claimed by the plaintiff. The rule must be read in connection with the context. There was no action at common law at all for damages. The action is one of indemnity arising out of the bond. The rule, however, is not applicable here at all. It refers to goods taken out of the plaintiff's possession, whereas the goods here were never taken out of his

possession. The plaintiff, by closing up his premises, prevented the sheriff from taking the goods : Mayne on Damages, 6th ed., 439. Argument.

Poussette, in reply. The defendant had always his remedy against the person who brought the replevin action. The replevin bond merely gave him the additional security of the sureties : Mayne on Damages, 6th ed. 440.

December 19, 1899. The judgment of the Court was delivered by

ARMOUR, C.J.:—

The Consolidated Rule 1074 is the statute 48 Vict. ch. 13, sec. 8 (O.) imported into the rules.

It is clumsily drawn, but the obvious intent of it was not to give an independent right of action upon it, but merely to add another condition to the replevin bond "theretofore required in that behalf" to be taken by the sheriff or bailiff "where an order of replevin is issued for any property which had not been previously taken out of the plaintiff's possession, for which the plaintiff might formerly have brought an action of trespass or trover."

It is unnecessary for us to point out what remedy the plaintiff has, if any, and it is sufficient for us to determine that he has no remedy in this action.

The motion must therefore be dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

COWAN V. FISHER.

Contract—Sale of Machine—Condition Precedent—Separate Covenant—Divisible Contract—Breach.

An agreement for the sale of a machine provided that the inventor should personally inspect the placing and setting of it in operation. The machine was delivered but the inventor refusing to go, the vendors sent another competent person to set it up :—

Held, that the vendors were nevertheless entitled to recover the price on the principle that the breach alleged did not go to the whole root and consideration of the contract, and, therefore, was not to be considered as a condition precedent but as a distinct covenant, the breach of which could be satisfied by damages.

Statement. THIS was an action brought in the County Court of the county of Waterloo by a firm of iron founders, carrying on business at Galt, against a firm of manufacturers, to recover the price of a machine, known as a No. 5 Moffat feeding water heater and purifier, alleged to have been ordered by and delivered to the defendants in September, 1897.

The defendants pleaded that the machine was purchased from the plaintiffs and one H. E. Moffat, and that one of the terms of the purchase was that Moffat should personally inspect and supervise the placing of the machine in operation and give all instructions so that all drip from rolls, drying and heating, should be returned to the machine: that Moffat was the inventor of the machine and negotiated sales of the same with customers, the plaintiffs merely making and constructing the same for him, and the defendants relied on the special knowledge and skill of Moffat to supervise the placing in operation of the same in their paper mill and otherwise would not have purchased the same, and that Moffat personally negotiated the sale with the defendants: that though the machine was delivered in April, 1898, the plaintiffs had not yet completed the setting of the machine and the same was in an unfinished state: that in spite of request made by the defendants, the plaintiffs and Moffat refused to carry out

the above term of the agreement as to Moffat superintending the putting up and starting the machine; and that they had more than once notified the plaintiffs of their willingness to pay for the machine and that they were now willing to pay the price when Moffat had done so; and by way of counterclaim they asked specific performance of the contract or for damages against the plaintiffs and Moffat. Statement.

The learned County Court Judge gave the plaintiffs judgment for the full amount claimed.

The defendants on November 15th, 1899, moved before a Divisional Court, consisting of BOYD, C., FERGUSON, and ROBERTSON, JJ., by way of appeal from the above judgment.

The facts as proved at the trial are stated in the judgments of the Divisional Court.

S. H. Blake, Q. C., and *Gwyn*, for the defendants other than Moffat, contended that the agreement must be taken as a whole, and that the provision as to Moffat superintending the putting up and starting of the machine was an integral part of it, and went to the very root of the contract: *Bowes v. Shand* (1877), 2 App. Cas. 455; that *prima facie*, such a clause having been inserted must be taken to be material: *Bettini v. Gye* (1876), 1 Q. B. D. 183; that in such a case as this though the matter depend on the act of a third party, yet non-performance of it prevents the plaintiff bringing his action: *Brogden v. Marriott* (1836), 2 Bing. N. C. 473; *Thurnell v. Balbirnie* (1837), 2 M. & W. 786. They also cited Benjamin on Sales, 4th ed. (Eng.) p. 545; Addison on Contracts, 8th Eng. Ed. (with American Notes), vol. 2, pp. 796, 797.

E. F. B. Johnston, Q. C., for the plaintiffs, pointed out that the defendant had kept the machine for nearly two years and had never suggested returning it, and contended that this bore upon the question whether the condition

Argument. relied upon should be regarded as a condition precedent in law; that the plaintiffs could not be held responsible for all time waiting for the convenience of the defendants; that no complaint had been made with regard to the machine, and that the Court would always lean to construing conditions as independent rather than as precedent: *Re Canadian Niagara Power Co.* (1899), 30 O. R. 185; *Carter v. Scargill* (1875), L. R. 10 Q. B. 564; *Ellen v. Topp* (1851), 6 Exch., at p. 441; *Bettini v. Gye* (1876), 1 Q. B. D., at pp. 187, 188; *Graves v. Legg* (1854), 9 Exch. 709; *Wms. Saund.*, vol. I, at p. 555; that it had not been shewn that any special skill was required to set up the machine: *Robson v. Drummond* (1831), 2 B. & Ad. 303; *British Waggon Co. v. Lea* (1880), 5 Q. B. D. 149.

Blake, in reply, contended that special skill was required and that the clause in question in the contract was eminently necessary; and that the plaintiff had no right to recover till the machine had been put up as contracted for.

January 2nd, 1900. BOYD, C. :—

The principle affirmed by Lord Ellenborough in *Davidson v. Gwynne* (1810), 12 East., at p. 389, was that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the part broken is not to be considered as a condition precedent, but as a distinct covenant for the breach of which the party injured may be compensated in damages. The effect of the Judge's finding in this case upon the evidence is that the personal intervention or supervision of the defendant Moffat in the "setting up" of the machine was not in all the circumstances absolutely vital to the contract, and that notwithstanding his failure to act the plaintiffs were entitled to recover the price.

I do not see my way, having regard to all that is in evidence, to disturb this result.

It may be noted first of all that the defendant Fisher has received the substantial part of the consideration, i. e.,

the machine, and has retained the same in his own power and custody for a long time. The heater was shipped to him in perfect condition on December 22nd, 1897, and has since been in his hands with no offer to return. This is an affirmation of the contract *pro tanto*, and there has been a substantial performance of it by the plaintiff: *White v. Beeton* (1861), 7 H. & N., at pp. 46, 51, 52.

Judgment.
Boyd, C.

That which has not been done is not essential to the beneficial operation and enjoyment of that which has been done; for the machine has been delivered, and it is admitted on the pleadings that a competent person was sent to set it up, and that the defendants refused to allow this to be done because Moffat was not present.

There are two contracts in this instrument, and in regard to the part not performed it is in substance a by-bargain between Moffat and Fisher, in which a special agreement was made with Fisher by Moffat acting (as he swears) independently of Cowan & Co. That is a separable part of the transaction, and is not to be regarded as a condition precedent as against Cowan & Co., who have done all that they could do in the absence of Moffat's co-operation, and all that could be done to put the machine into a state of efficiency as a part of the steam system in the defendants' mill.

The defendant Fisher has in fact claimed damages against Moffat by way of counterclaim for failure to give personal attendance to set up the machine.

Altogether the application to this peculiar contract of the rule stated by Parke, B., and applied in *Bettini v. Gye* (1876), 1 Q. B. D. 183, solves the difficulty. It does not appear that this particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for. It merely partially affects it, and may be compensated for in damages; and if the machine is properly set up by a competent mechanic there are no damages really to the defendant from the absence of literal compli-

Judgment. ance with this provision : *British Waggon Co. v. Lea* (1880),
Boyd, C. 5 Q. B. D., at p. 153; *MacAndrew v. Chapple* (1866), L. R. 1
C. P. 643.

I would affirm the judgment of the County Court Judge with costs.

FERGUSON, J. :—

After a perusal of the whole case I am of the opinion that the paper Exhibit 1, when the words endorsed upon it, are as was agreed, read as if they appeared on the face of it, if this could make any difference, embodies the agreement between the plaintiffs and the defendants. This is in the form of an order signed by the defendants, which was adopted and accepted by the plaintiffs by their shipping the machine ordered and suing for the price. A term or condition of this agreement was that Mr. Moffat, who was the inventor of the machine and the plaintiffs' agent for sales of it, was personally to inspect the placing the machine in operation and to give instructions so that all drips from rolls, dryers and heating could be returned to the system (the machine), and in respect to this term or condition the plaintiffs became bound when they accepted the order and shipped the machine to the defendants. The plaintiffs, as part of the agreement, undertook and agreed that Moffat should do these things, and Moffat having failed or declined to do them the contention was that a condition precedent remained unperformed and that as a consequence of this the plaintiffs should not be permitted to recover the price.

It seems to be admitted by the pleadings that the plaintiffs procured and sent a competent mechanic familiar with erecting and placing machines similar to the one in question to the defendants and that an offer was made by him to place the machine in the proper position, the plaintiffs' manager being present and offering to guarantee the satisfactory working of the same, but this the defendants

refused to allow desiring that this work or duty should be done and performed by Moffat and by no other person. Judgment.
Ferguson, J.

Moffat was the inventor and patentee of the machine and besides had had experience in setting it up and in position for doing its work, and from all that appears in the evidence one has little difficulty in arriving at the conclusion that it was for these reasons that he was named as the person to set up or superintend the setting up of the machine. Both Moffat and one of the defendants in their evidence say that, but for this provision the order would not have been given at all.

As far as the character of the service to be performed by Moffat has concern, the rule seems to be stated by Cockburn, C. J., in the case *British Wagon Co. v. Lea* (1880), 5 Q. B. D., at p. 153, in this way: "Where it can be inferred that the person has been selected with reference to his individual skill, competency or other personal qualification, the inability or unwillingness of the party * * to execute the work or perform the service is a sufficient answer * * Personal performance is in such a case of the essence of the contract, which consequently cannot in its absence be enforced against an unwilling party." If this were the only subject to be considered my view would be in favour of the defendants.

There is, however, another proposition of law which is found in the footnotes to the case *Pordage v. Cole* (1680), 1 Wms. Saunders, at p. 554 and is: "When it appears that the consideration has been executed in part, that which was before a warranty or condition precedent loses the character of a condition or to speak more properly ceases to be available as a condition and becomes a warranty in the narrower sense of the word, namely, a stipulation by way of agreement for the breach of which compensation must be sought in damages." In the present case the machine was shipped to the defendants and they have it on the premises and in their possession, and they have so had it for a long period. This is the substantial part of the consideration; the unperformed part, namely,

Judgment. the supervision of the setting up of the machine is comparatively only a small part of the consideration and the breach of the contract in respect of this can, as I think be readily satisfied by damages. I am not unaware of the difficulties arising in applying this proposition of law, especially in cases where it is asserted that the consideration being for a payment in money is entire and indivisible, nor am I unaware of the many cases that have been decided, having reference to the proposition and the sometimes nice distinctions that are to be noticed amongst them.

Ferguson, J.

I am, however, after the best consideration I have been able to bestow upon the subject, of the opinion that the provision in the agreement respecting the setting up of the machine, or the supervision of such setting up by Moffat cannot now be successfully set up and maintained as a condition precedent.

As to the flanges that it is said were not delivered, the evidence seems to shew that the sizes of them were not known, such sizes depending on the sizes of pipes or other apparatus of the defendants, and there can, on the evidence, be no doubt that had the plaintiffs been permitted to set up the machine they would in proper time have furnished these flanges.

I do not deem it needful to say anything by way of commentary on the correspondence in respect to the setting up of the machine that took place between the defendants and Moffat.

I think the judgment should be affirmed with costs.

ROBERTSON, J., concurred.

A. H. F. L.

MONTGOMERY V. RUPPENSBURG.

Specific Performance—Land out of Ontario—Jurisdiction.

The plaintiff, a resident of Buffalo, United States, agreed in writing with the defendant, to exchange certain land situate in Buffalo for land of the defendant situate in Ontario; and brought this action for specific performance of the contract:—

Held, that the plaintiff having brought his action in this Court, thereby submitting to its jurisdiction, the Court would decree specific performance.

THIS was an action for the specific performance of **Statement.** an agreement in writing whereby the defendant, who resided in the county of Welland, in this Province, agreed with the plaintiff, who resided at Buffalo, in the State of New York, to exchange some land of hers situate in the county of Welland for some land of the plaintiff situate in the city of Buffalo.

The defendant resisted specific performance upon the grounds set out in the judgment.

The action was tried at Welland before MEREDITH, C.J., without a jury, on September 11th, 1899.

Collier, and *H. R. Morwood*, for the plaintiff, referred to *Paisley v. Wills* (1890-1), 19 O. R. 303, 18 A. R. 210; *St. Denis v. Higgins* (1893), 24 O. R. 230; Fry on Specific Performance, 2nd ed., pp. 12-22.

L. C. Raymond, for the defendant, referred to *Brewer v. Broadwood* (1882), 22 Ch. D. 105, especially at p. 109; *Hamilton v. Grant* (1815), 15 Rev. Rep. 5; *Flight v. Bolland* (1828), 28 Rev. Rep. 101; *Hills v. Croll* (1845), 14 L. J. Ch. 444; Fry on Specific Performance, 3rd ed., sec. 460; Digest English Case Law, vol. 13, col. 1850.

December 13th, 1899. MEREDITH, C.J.:—

Action for specific performance tried at Welland on September 11th, last, without a jury.

The plaintiff is a resident of Buffalo, and on April,

Judgment. 6th, 1899, entered into an agreement in writing with the defendant for the exchange of land in Buffalo for land of the defendant situate in Ontario, the plaintiff agreeing to pay \$400 in money besides conveying the Buffalo property in exchange for the land of the defendant.

Meredith,
C.J.

It appeared in evidence that the plaintiff did not own the Buffalo property, but that it belonged to his wife, and the defendant resists specific performance on three grounds :

1. That she was induced to enter into the contract by the fraud and misrepresentation of the plaintiff.

2. That there was not mutuality because of the plaintiff not being himself the owner of the Buffalo land.

3. That the lands which she was to receive in exchange for her property being in, and the plaintiff being a resident of a foreign country, specific performance could not be enforced at his instance.

At the trial I disposed of the first defence adversely to the defendant, and reserved judgment as to the others.

The second ground of defence is concluded against the defendant, on the findings of fact which I made at the trial, by the cases of *Paisley v. Wills* (1890-1), 19 O. R. 303 ; *S. C.*, 18 A. R. 210 ; and *St. Denis v. Higgins* (1893), 24 O. R. 230.

The third ground relied on is also in my opinion untenable. It is clear and was not disputed, that the fact of the land, which is the subject of the contract, being in a foreign country does not prevent the Court awarding specific performance if the parties are within the jurisdiction, but it was argued that as the contract could not be enforced against the plaintiff by reason of the property which he contracted to give in exchange for the defendant's land being situate in and his being a resident of a foreign country, the contract was not mutual, and, therefore, according to the principles upon which the Court directs the specific execution of contracts one, the specific performance of which, ought not to be enforced.

It is, I think, a sufficient answer to this objection that the plaintiff having brought his action in this Court and thereby submitted to its jurisdiction has waived the want of mutuality and rendered the remedy mutual: Fry on Specific Performance, 3rd ed., par. 471, p. 220.

Judgment.
Meredith,
C.J.

If it were not so the Court could never enforce the specific performance of a contract which is unilateral, nor could it give that relief where the contract is not evidenced by a writing sufficient to satisfy the Statute of Frauds signed by the party seeking to have it specifically enforced and yet there have been numerous cases coming within each of these classes in which decrees have been made. Many of them are referred to in Fry on Contracts, at p. 200; and reference may be made specially to the language of the Master of the Rolls in *Martin v. Mitchell* (1820), 2 J. & W., at p. 426-27, and I may refer also to *Morgan v. Holford* (1852), 1 Sm. & Giff. 101, and to 2 White & Tudor's Leading Cases in Equity, 7th ed., p. 534, and the cases there cited and referred to.

The cases cited by Mr. Raymond do not, in my opinion, apply. Such cases as *Peto v. The Brighton, etc., R. W. Co.* (1863), 9 L. T. N. S. 227, were decided on the principle shortly stated by Vice-Chancellor Wood (at p. 228), that such an agreement as that in question there "must be taken in its entirety, and that as the Court could not enforce its terms on one part, it would decline to do so on the other." In that case the Court could not enforce one part of the agreement—that relating to the construction of the railway—because it could not superintend the performance of the work, and the offer of the contractors to perform the contract on their part could not get rid of that insuperable difficulty in the way of specific performance, while in this case the submission of the plaintiff to perform the agreement removes any difficulty in adjudging specific performance arising out of the fact of the lands being in a foreign country.

It appeared that the defendant is not owner of a part of the land which she contracted to give to the plaintiff, but

Judgment. the plaintiff is willing to take the part she can give him
Meredith, and compensation for the risk, and he is, I think, entitled
C.J. to that.

There will, therefore, be judgment for specific performance with compensation to the plaintiff for so much of the Ontario lands as the defendant is unable to make title to and referring the question of title and compensation to the local Master at Welland. The defendant must pay the costs up to and including the trial, and further directions and subsequent costs will be reserved until after the Master has made his report.

A. H. F. L.

MCCORMICK V. COCKBURN.

Mortgage—Fraud of Solicitor—Assignment of Mortgage—Liability.

The plaintiff, for the purpose of raising a portion of the purchase money on a contemplated purchase of property, mortgaged lands then owned by him to the defendant C., the money being received by a solicitor who acted for both parties. The purchase not having been carried out, the plaintiff desired to have the mortgage discharged, whereupon the solicitor, who had misappropriated the moneys, paid the mortgagee and fraudulently procured from her an assignment of the mortgage to himself which he assigned to the defendant P., who advanced the money thereon in good faith and without any knowledge of the fraud :—

Held, that the plaintiff was entitled to a reconveyance of the property released from the mortgage, and that the loss must be sustained by the defendant P., who took nothing under the assignment to him, for the mortgage being paid off, the solicitor acquired no beneficial interest, being at most but a trustee of the legal estate, and could pass no better title to his assignee.

Statement. THIS was an action tried before MEREDITH, C. J., without a jury, at Hamilton, on the 25th October, 1899.

The action was brought to have it declared that a mortgage given by the plaintiff to the defendant Cockburn had been satisfied, and for a release of the property from the mortgage, and for a reconveyance to him of the property comprised in the mortgage.

The learned Chief Justice reserved his decision, and sub-

sequently delivered the following judgment, in which the Statement. facts, so far as material, are set out.

Lynch Staunton, Q.C., for the plaintiff.

W. H. Blake, for the defendant Cockburn.

John Crerar, Q.C., for the defendant Penman.

January 6th, 1900. MEREDITH, C. J. :—

This case is another to be added to the long list of those in which one of two innocent parties must suffer owing to the fraudulent conduct of the solicitor employed to transact their business.

The money loaned by the defendant Cockburn to the plaintiff on the security of the mortgage in question, was received by the solicitor who acted for both parties, and by him fraudulently appropriated to his own use. The money was borrowed to enable the plaintiff to complete the purchase of some property which he contemplated buying, but the transaction fell through for a reason which it is unnecessary to refer to. Being pressed for a discharge of the mortgage, the solicitor, pretending that the mortgagor had come into a legacy which enabled him to pay off the mortgage, arranged with the mortgagee that she should accept the amount loaned, with a bonus of three months' interest, in payment of the mortgage money and discharge the mortgage, but upon paying the money to her, instead of obtaining a statutory discharge of the mortgage, the solicitor procured the execution by her to him of an assignment of it, and afterwards assigned the mortgage to the defendant Penman, who purchased it for value, and in good faith, without any knowledge whatever of the fraud which had been committed by the solicitor.

On this state of facts, it follows, I think, without doubt, that the loss must fall on the defendant Penman. The mortgage was paid off, as I have said, and the solicitor took no beneficial interest in it by the assignment to him; he was at most but a trustee of the legal estate for the

Judgment. plaintiff, and could pass no higher or better title to his
Meredith, assignee.
C.J.

There must, therefore, be judgment for the reconveyance to the plaintiff of the lands embraced in the mortgage security in question and for the delivery to him of the mortgage and title deeds and a release of the mortgage debt, but under all the circumstances of the case it will be without costs.

I do not deal with the third party notice as the defendants did not desire any adjudication to be had as to it.

G. F. H.

[DIVISIONAL COURT.]

MORSON V. BURNSIDE.

Principal and Agent—Sale of Land—Land Agent—Commission.

The defendant, knowing that the plaintiff was a land agent, arranged with him to procure a purchaser for his house and lot at a named price. Through the plaintiff's intervention a proposed purchaser was procured and a purchase discussed. Subsequently, and as a result of the discussion, a lease was entered into of the premises for three years with a collateral agreement giving the purchaser the option of purchasing within a year, which he exercised:—

Held, that the plaintiff was entitled to his commission from the defendant.

Statement. THIS was an appeal by the plaintiff from the judgment of one of the junior Judges of the County Court of the county of York (Edward Morgan, Esquire), dismissing the action with costs after the trial of it by him without a jury.

The action was for the recovery of a commission alleged by the plaintiff, who is a land agent, to have been earned by him on the sale of a house and lot belonging to the defendant, to one Charles Frederick Moore for \$6,500.

The learned Judge found that the defendant had not placed his property in the hands of the plaintiff for sale; and that even if he had done so the sale which was made

to Moore was made under such circumstances that the Statement.
plaintiff was not entitled to commission in respect of it.

From this judgment the plaintiff appealed.

On January 19th, 1900, before a Divisional Court composed of MEREDITH, C. J., and MACMAHON, J., the appeal was argued.

Herbert Mowat, for the appellant. The question here is, was there or not a valid contract to pay commission. The defendant knew that the plaintiff was a land agent and he employed him to sell the land. The plaintiff brought the defendant and the purchaser together, and the result was the contract which was entered into between the defendant and purchaser, under which the purchaser took a lease for a year with an option to purchase; and the option was duly exercised. This was part of the one transaction, originating out of the relationship brought about by the plaintiff. The test is, was the purchase brought about through the plaintiff's intervention: *London and North-Western R. W. Co. v. Gomm* (1882), 20 Q. B. D. 562 and 580; *Great Western R. W. Co. v. Desjardins Canal Co.* (1862), 9 Gr. 503; (1864), 2 E. & A. 330; Article, Real Estate Brokers (1886), 22 Central L. J. 126; *Mansell v. Clements* (1874), L. R. 9 C. P. 139; *Ludlow v. Carman* (1858), 2 N. Y. 107.

R. G. Gibson, contra. To entitle the plaintiff to recover he must shew that a binding contract was entered into when the parties were brought together. At the time the defendant and Moore first met no contract was then entered into, and the fact that Moore subsequently exercised an option to purchase cannot relate back to the prior relationship.

January 30, 1900. MEREDITH, C. J. (after stating the facts as above):—

I have come to a contrary conclusion upon both points. The facts upon which the plaintiff relied to establish his retainer were practically undisputed.

Judgment.

Meredith,
C.J.

The plaintiff was, to the knowledge of the defendant, a land agent, and knowing that the defendant had been willing to sell the house and lot for \$6,500, communicated with him by telephone desiring to know if the defendant was still willing to sell at that price, and telling him that he (the plaintiff) could then find a purchaser for him at that price, to which the defendant replied that his price was still \$6,500, whereupon the plaintiff entered the transaction in his books, advertised the property for sale, and set about to find a purchaser for it, which resulted in his bringing Moore to the defendant, and introducing him as an intending purchaser.

Upon this state of facts, I think that, especially in the absence of an explicit denial by the defendant that he so understood the transaction, and there is none, the only reasonable inference to be drawn from what took place between the parties is that the defendant authorized the plaintiff to act as his agent in procuring a purchaser for the property at \$6,500.

The learned Judge in reciting, as he has done, the facts on this branch of the case omits what appears to me a most important fact, namely, the statement of the plaintiff to the defendant that the former could find a purchaser for the defendant if his price was still \$6,500. That that statement was made is sworn to by the plaintiff, and there is no denial of it by the defendant.

In the notes of the evidence the following question to and answer by the defendant appear:—"Q.—And he said in addition to that, 'I think I can make a sale for you.' A.—I do not know whether he might have said that; but I said I would not take anything less than \$6,500."

Having regard to the fact that the defendant knew that the plaintiff's business was that of land agent, no other inference than that which I have said should be drawn—could I venture to think be reasonably drawn—from what took place between the parties.

The facts on which the determination of the other branch

Judgment.

Meredith,
C.J.

of the case depends are these : After the plaintiff had introduced Moore and his father to the defendant, the former, as an intending purchaser, there was a second interview between the parties, at which the plaintiff was present. The price and terms of sale were discussed, and Moore was satisfied with them, but was not then prepared to bind himself definitely to buy. As the parties were leaving the office where they had met, Moore (the father) said to the defendant that he would like to see him alone, and thereupon it was arranged that they should meet on the following day at the office of the defendant's solicitor. On the following day the parties met, and Moore (the father) said to the defendant that his son was not prepared to buy the house just then, as they wanted to know if the house was a suitable one for the purpose for which it was required—a physician's residence and office,—and expressed a wish to rent it for a year, with the privilege of buying at the end of the year, to which the defendant assented; and thereupon an offer in writing to sell to Dr. Moore for the price and on the terms which had been discussed, open for a year, was signed by the defendant, and a lease of the property for three years at the annual rent of \$360 was executed by both parties. The term was made three years at the suggestion of the defendant. The two documents were separate though they were executed contemporaneously, and expressed the terms of one entire and not two separate bargains. Moore elected to purchase within the year; and the purchase having been completed, the plaintiff applied to the defendant for his commission on the sale; and the defendant having repudiated liability this action was brought.

The sale to Moore was, in my opinion, the direct result of the plaintiff's efforts to find a purchaser for the defendant's property, and the contractual relation of vendor and purchaser directly resulted from those efforts. If the test which the late Lord Watson said was the proper one to be applied in determining the right of an agent to commission is applied (*Toulmin v. Millar* (1888), 58 L. T. N. S. 96), it will be found

Judgment. that the plaintiff's case fully meets it. He there says:—"In
Meredith, order to found a legal claim for commission, there must not
C.J. only be a causal, there must also be a contractual relation between the introduction and the ultimate transaction of sale;" and there was, as I have said, in this case both.

The case might have been different had negotiations been broken off when the parties left the office at which they had met. They were not, however, broken off, but what took place when the documents were executed was a continuation of the negotiations which had been begun owing to the plaintiff having introduced Moore as an intending purchaser, and the sale, which was finally made at the expiration of the year, was the direct result of those negotiations. If Moore at the meeting, to which I have referred, had asked a week's time to consider the question of purchase, and at the end of the week had elected to buy and had then concluded the purchase, it can scarcely admit of doubt that the plaintiff would have been entitled to commission; and I can see no principle upon which the result should be different where the delay granted is not a week but a year. The effect of what was done, as it appears to me, was that the offer which the defendant made to Moore was not declined by Moore, but on the contrary was kept open for a year, and it was in substance that offer that was eventually accepted.

See also *Brackenridge v. Claridge* (1898), 43 L. R. Annot'd., at pp. 593, 601-2.

The appeal should, in my opinion, be allowed with costs, the judgment below be reversed, and instead thereof judgment be entered for the plaintiff for \$137.50 and interest thereon from 1st May, 1899, with costs.

MACMAHON, J. :—

The conclusion fairly deducible from the evidence is: that the defendant placed the house and lot in question in the hands of the plaintiff, an estate agent, for sale at \$6,500, and that the sale to Moore was the direct result of plain-

tiff's intervention and exertions. Where that is the case the length to which the Courts have gone in holding that the agent or broker cannot be deprived of his commission is well illustrated by such cases as *Rimmer v. Knowles* and *Green v. Bartlett*. In *Rimmer v. Knowles* (1874), 30 L. T. N. S. 496, where defendant instructed the plaintiff, a surveyor, to sell an estate and agreed to give him £50 if he obtained a purchaser at £2,000. Afterwards defendant raised his price to £3,000, and plaintiff found for him a builder who in his evidence said he and defendant agreed that he should purchase the land. He was to take it on interest at £3,000, £150 a year, and he signed a lease for 999 years accordingly, giving him occupation and option to complete purchase during twenty years. It was held that these facts substantially constituted a purchase and that the plaintiff was entitled to recover the agreed amount of commission.

Judgment.
MacMahon,
J.

Cockburn, C.J., said, "I think the arrangement was equivalent to a purchase."

And Quain, J., said, "I think if the defendant were not liable in this case, it would lead to great difficulty, and commission could seldom be earned at all. The plaintiff, to my mind, substantially found a purchaser for the defendant, and therefore ought to recover."

So in *Green v. Bartlett* (1863), 14 C. B. N. S. 581, where the agent had failed up to a given time to effect a sale, whereupon the owner told him he had concluded not to part with his property; but subsequently the owner privately negotiated a sale with a person who, as it was shewn, had been attracted to the office of the broker by the advertisements displayed by him, and had learned from him the name and address of the owner, it was held that the agent was entitled to his stipulated commission.

And in *Reed's Executors v. Reed* (1876), 82 Pa. St. 420, where an owner offered to pay a broker a certain sum to obtain a purchaser for his property, and the broker procured parties to enter into negotiations for the purchase, and pending these negotiations the owner allowed these parties

Judgment. five or six weeks' time to decide upon terms made by him
MacMahon, in answer to theirs, it was held that a contractual relation
J. was created which was violated by a sale by the owner to third parties within the time allowed, and that the broker was entitled to recover the stipulated compensation.

See also the judgment of the House of Lords in *Bayley v. Chadwick* (1879), 39 L. T. N. S. 429; *Munsell v. Clements* (1874), L. R. 9 C. P. 139; *Wilkinson v. Alston* (1879), 48 L. J. N. S., Q. B. 733, judgment of Brett, L. J., at p. 735.

I agree that the appeal must be allowed and judgment entered for the plaintiff as directed in the judgment of His Lordship the Chief Justice.

G. F. H.

[DIVISIONAL COURT.]

REEKIE v. McNEIL.

County Courts—Appeal—Inability of High Court to Extend Time.

The provisions of sections 55 and 56 of the County Courts Act, limiting the time in which an appeal from the County Court to the Divisional Court must be set down are peremptory and there is no power to dispense with such provisions, or to enlarge the time for setting down the appeal.

Where, therefore, a Judge of a District Court refused to certify the pleadings so as to enable an appeal to be set down for the Divisional Court and an order was obtained from a Judge to allow such an appeal to be set down, such order was held to be of no avail and the appeal was struck out.

Statement. THIS was an action to recover the sum of \$250 as damages for breach of contract to accept timber to be cut and delivered by the plaintiff.

The action came on for trial on the 6th June, 1899, before the District Judge, at Parry Sound, and, upon the defendant's counsel objecting that the amount claimed was unliquidated and beyond the jurisdiction of the District Court, the Judge directed a nonsuit to be entered.

Neither the plaintiff's counsel nor the Judge seemed to

have been aware of the provision contained in sec. 26 of the County Courts Act, which gave power to the plaintiff to abandon an excess so as to bring his action within the jurisdiction of the Court. Statement.

When the plaintiff's counsel became aware of the existence of this section, he served a notice of motion, dated the 11th June, returnable before the Judge in Chambers, asking to have the nonsuit set aside.

On the return of the motion, counsel for the defendant objected that the only right to appeal to the District Judge from a judgment pronounced at the trial was that given by sec. 51 of the County Courts Act to appeal to the County Court within the first two days of the quarterly sittings held next after the decision complained of, and that the Judge had no jurisdiction to dispose of such motion except at such quarterly sittings. This objection was overruled, and by an order, dated the 21st of June, the nonsuit was set aside, and the plaintiff was given liberty to proceed to trial at the first sittings the Court might hold for trial without a jury pursuant to section 19 of the statute. The Judge then proceeded to appoint a special sittings to be held on the 14th July, 1899.

The defendant served notice that he would apply to the Judge at the opening of Court on the said 14th July, for an order rescinding the order for a new trial. That application was dismissed with costs, but an order was made postponing the trial until the 15th August.

The plaintiff, on the 12th of July, filed a document abandoning the excess of his claim.

On the 10th August, the defendant served notice of appeal to a Divisional Court from the orders of the 21st June and 15th July.

On the 12th of August, application was made on the part of the defendant to the clerk of the Court at Parry Sound to forward the papers to the central office, a præcipe being filed and the proper amount to cover expenses being paid. Later on that same day the clerk announced that, after talking the matter over with the Judge, he had con-

Statement. cluded that it was not proper for him to forward the papers to the central office owing to the fact that the trial had been fixed for the 15th August, and that some of the papers would be needed at it.

On the 14th August, an application was made to the Judge himself to certify copies of the pleadings and proceedings; but the Judge took the position that there was no practice which justified his certifying copies instead of the originals.

An application was then made to MACMAHON, J., on an affidavit, who granted a fiat for the setting down of the appeal to the Divisional Court without production of the certified copies, pending such action as the defendant might take to compel the Judge to certify.

On December 15th, 1899, a motion was made on behalf of the plaintiff to set aside the notice of appeal, on the ground that it had not been set down in time.

Before the plaintiff's motion came on to be heard the papers duly certified reached Osgoode Hall.

R. U. MacPherson, for the motion.

Hugh Rose, contra.

December 18th, 1899. The judgment of the Court was delivered by

ARMOUR, C. J. :—

The County Courts Act, R.S.O. ch. 55, provides by section 57, that "the appeal shall be set down for argument at the first sittings of a Divisional Court of the High Court of Justice which commences after the expiration of one month from the judgment order or decision complained of."

We have held that until the Judge has certified under his hand to the proper officer of the High Court, as provided by sections 55 and 56 of the said Act, the appeal cannot be set down for argument: *McCarron v. Metropolitan Life Ins. Co.* (1899), 19 C. L. T. 230. See also *Gilmor*

v. *McPhail* (1894), 16 P. R. 151 ; and after the time limited Judgment. by the statute for setting it down has expired we have no Armour, C.J. jurisdiction to hear it : *Ex p. Whitton* (1880), 13 Ch. D. 881.

If the Judge neglects or refuses to certify under the said sections, in time to enable the appeal to be set down within the time limited by the statute, we cannot dispense with it or enlarge the time for granting it.

The proceedings being certified by the Judge to the proper officer of the High Court in time to enable the appeal to be set down within the time limited by the statute under sections 55 and 56, is a condition precedent to our jurisdiction.

"Where, however, the act or thing required by the statute is a condition precedent to the jurisdiction of the tribunal, compliance cannot be dispensed with; and if it be impossible the jurisdiction fails:" *Maxwell on Statutes*, 3rd ed., p. 543.

The appeal will therefore be struck out but under the circumstances without costs.

G. F. H.

[DIVISIONAL COURT.]

REGINA EX REL. HORAN V. EVANS.

Public Schools—Trustee—Residence.

The defendant, a life tenant of a farm, in the township of Albion, lived on it from 1888 until 1894, when he rented it to his son and went to live with his wife and family on a farm owned by his wife, in the township of Caledon, where he continued to live until 1898, when the son having given up possession of the Albion farm, he took possession of it, to enable him to work it, sleeping in the house, and occasionally visiting his wife and family who remained in Caledon and remaining there over night, while the wife occasionally visited him, staying a couple of weeks :—

Held, that the defendant's place of residence was where his wife and family lived, and he was therefore not a resident within the township of Albion so as to qualify him as a trustee of a school section within that township, to which he had been elected; but as the granting of the order for a *quo warranto* was in the discretion of the Court, and the term of the defendant's office would expire before the issue could be tried, the motion was dismissed without costs.

Sub-sec. 8 of sec. 4 of the R. S. O. ch. 292 providing for an investigation as to the election by the inspector would not of itself prevent the granting of such order.

Statement. THIS was an appeal by the relator from a judgment of ROSE, J., sitting in the Weekly Court at Toronto, on 18th July, 1899, dismissing an application for an order for leave to exhibit an information in the nature of a *quo warranto* against Richard Evans, to shew by what authority he claimed to exercise the office of school trustee for school section No. 7, in the township of Albion, in the county of Peel.

The ground upon which the application was made was, that the said Richard Evans, at the time he was so elected in January, 1899, was, and that he ever since has been, resident outside the said school section.

Richard Evans, opposed the application upon the ground that he was at the time of his election, and ever since had been, a resident of the school section in question; and upon the further ground that the application should have been made within twenty days after the election.

The appeal was argued on 20th December, 1899, before a

Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ. Argument.

T. J. Blain, for the relator. The affidavits shew that Evans was not a resident in the school section. In any event a *prima facie* case has been made, and we are entitled to the information asked for to try the right. This cannot cause any injury to the defendant as we have to give security for costs: *Bewdley Case* (1869), 1 O. M. & H. 174; *Brightley's Election Cases* (1871), 475; *Regina ex rel. Moore v. Nagle* (1894), 24 O. R. 507.

W. S. Morphy, of Brampton, contra. The motion for the information was too late. Under sec. 60 of the Public Schools Act, R. S. O. ch. 292, the motion should have been made within twenty days after the election, while here it was not made until long afterwards. The proper conclusion to come to upon the evidence is that the defendant was a resident in the township. He had his own farm there and lived on it, while the farm in the other township was that of his wife, and though he was there from time to time, he was also in possession of his own place and living there. The learned Judge appealed from had all the facts before him, and he has found in favour of the defendant, and the Court should not review his decision unless the facts are conclusive.

December 29th, 1899. The judgment of the Court was delivered by

STREET, J. :—

The affidavits shew that Richard Evans, against whose tenure of the office of school trustee this application is made, has been, since the year 1888, the owner for his own life of a farm within the school section of Albion for which he sits as school trustee, and that he lived upon it until the spring of 1894, when he leased it to his son and moved away.

Judgment.

Street, J.

In the spring of the year 1898, he was living with his wife and five children upon a farm owned by her in her own right in the adjacent township of Caledon. In the spring of 1898, his son, the lessee of the farm in Albion, gave it up, and in April, 1898, the respondent again took possession of it, and he swears that he has ever since resided there. There is a good house upon the lot in which he sleeps, and he has stock and implements upon it, and barns and outhouses for housing them and for storing the grain raised upon the farm. He and his wife are on excellent terms, and he swears that he occasionally pays her visits in Caledon staying over night, and that she goes to him occasionally, sometimes for a week at a time, and when there, does cooking and mending for him.

A number of affidavits have been filed, but they do not throw any light upon the facts I have stated. He himself and his wife and his friends evidently fully believe that he is properly described upon these facts as being a resident of Albion, and not of Caledon. The relator and his friends are of a different opinion.

My brother Rose has come to the conclusion that Evans, having been undoubtedly down to the spring of 1894, a resident of Albion, has not been shewn to have ever intended to leave it, and that his absence is to be treated as a merely temporary one not sufficient to enable him to acquire a new residence.

With the greatest respect I find myself unable to concur in this view. He appears from the affidavit of Jane Evans, his wife, to have resided with her and with five of their children upon her farm in Caledon, down to the time when his son gave up the farm in Albion in April, 1898. I think it must be assumed that his home and residence were there with his wife and children in Caledon, down to that time at all events. After that time I think that the proper legal conclusion, from the evidence, is that he still continued to reside in Caledon where his wife and children were and where his home really was, although the proper

working of the farm in Albion required that he should spend the greater part of his time there.

Judgment.

Street, J.

The term of office, however, of Evans, was for a year only from 3rd January, 1899, as he was elected to fill a vacancy in the board, and the term of the trustee in whose place he was elected would have expired with the present year.

If we were now to grant the order asked for, the term of office of the trustee whose seat is attacked would have expired before the questions at issue could be tried. The granting of the order asked for is in the sound discretion of the Court, and it would not, in my opinion, be a proper exercise of that discretion to allow *quo warranto* proceedings to be taken which could result in no practical good: High on Extraordinary Legal Remedies, 2nd ed., pp. 472, 473; *People v. Sweeting* (1807), 2 Johns. (N. Y. S. C.) 184; and I am of opinion that we should not grant the order.

I do not think the relator would have been debarred by sub-sec. 8 of sec. 14, ch. 292 R. S. O., from making the application had it come before us in time.

The application will, therefore, be dismissed; but as the relator was right, in my opinion, upon the question of fact, there should be no costs here or below, and the order appealed from should be amended so as to carry this into effect.

G. F. H.

POTTS v. POTTS.

*Life Insurance—Change of Beneficiary—Statutes—Inconsistent Clauses—
R. S. O. (1897) ch. 203, secs. 151, 160.*

Where two clauses in a statute cannot be reconciled the later must prevail over the earlier one.

By sec. 151 of the Ontario Insurance Act, R. S. O. (1897) ch. 203, the assured may by an instrument in writing substitute a new beneficiary in a life policy, provided that he does not divert the benefit of any person who is a beneficiary for value. By section 160 he may in like manner transfer the benefit to his wife alone, although the policy is expressed to be for his mother's benefit, unless the policy expressly states that the original beneficiary is a beneficiary for value.

A person having effected an insurance on his life in favour of his mother as beneficiary, the policy not expressly stating that she was a beneficiary for value, subsequently transferred the benefit of it to his wife alone :—

Held, that section 160 must govern and that the wife was entitled to the policy moneys.

Statement. THIS was an action tried before ROSE, J., without a jury at Hamilton, on November 22nd, 1899.

*Gordon Waldron, and Thomas Mulvey, for the plaintiff.
Teetzel, Q. C., and W. M. McClemon, for the defendant.*

The learned Judge at the close of the case reserved his decision and subsequently delivered the following judgment in which the facts, so far as material, are stated.

January 11, 1900. ROSE, J. :—

The plaintiff was the mother of the insured, and the defendant was his wife.

The insured died on or about the 11th July, 1899. On the 10th July, 1893, he was admitted a member of the Supreme Tent of the Knights of the Maccabees of the World, and received a benefit certificate number 5,448, which provided for payment of \$1,000, to the plaintiff. At this time the insured was unmarried. He married the defendant in the month of July, 1897.

His death took place on the 11th July, 1899, as the result

of an operation at the hospital in Hamilton. Immediately before leaving the house to submit to the operation, on the day before his death, he made a declaration in writing referring to this policy, transferring the benefit of the policy to the wife alone. The words of the declaration were as follows: "I hereby direct that my estate shall be divided as follows: first, to my wife Ada Lavinia Potts, shall be paid all my insurance, namely, * * Knights of the Maccabees of the World, policy of \$1,000. This policy is payable to my mother Rhoda Potts as beneficiary; but I direct that it be paid to my wife."

Judgment.

Rose, J.

The plaintiff claims as a beneficiary for value, and by her replication alleged fraud and undue influence, and that at the time of making the declaration the insured had not sufficient mental capacity to enable him to validly make the transfer.

There was no evidence at all to support these charges, and the case must turn upon the question of whether the plaintiff can maintain her position as a beneficiary for value.

The plaintiff relied upon sec. 151 of the Ontario Insurance Act, R. S. O. (1897) ch. 203. The defendant relied upon the provisions of sections 159 and 160 of the same Act. It is difficult to understand the necessity for the co-existence of the two sections. The difficulty in reconciling them will appear from what follows.

Section 151, after declaring that every person of the full age of twenty-one years shall be deemed to have an unlimited insurable interest in his own life, provides that the assured may by an instrument in writing from time to time "alter or revoke the benefits * * or add or substitute new beneficiaries * * provided that the assured shall not alter, or revoke, or divert the benefit of any person who is a beneficiary for value."

The plaintiff contends that the assured by an instrument in writing attempted to revoke the benefit conferred upon her, and to substitute a new beneficiary, but that such attempt was futile by reason of the proviso which preven-

Judgment.

Ross, J.

ted him from diverting the benefit from her, a beneficiary for value. If the right of the defendant depends upon the question of whether or not the plaintiff was a beneficiary for value, of course that fact must be found. But the defendant says that such section does not apply, because section 160 in express terms provides for a case such as this. That section enables an assured by an instrument in writing to "transfer * * the benefits of the policy to the wife alone * * although the policy is expressed or declared to be for the benefit of * * the mother." The proviso in such section is as follows: "Provided that the assured shall not by virtue of the preceding sub-sections be authorized * * to divert the said insurance moneys or benefits, or any part thereof, from the original beneficiary where the policy expressly states that the beneficiary was a beneficiary for value."

The contention of the defendant is that as this policy does not expressly state that the plaintiff was a beneficiary for value, there was no limitation by the statute upon the right of the insured to divert the benefit from the mother to the wife.

If it is impossible to reconcile these two clauses, the latter must govern: *Maxwell on Statutes*, 3rd ed., pp. 214 *et seq.*, especially p. 216.

The text writer says: "The later of two passages in a statute being the expression of a later intention should prevail over the earlier as it unquestionably would if it were embodied in a separate Act."

Under section 151 the fact must be inquired into and found. Under section 160, if the policy does not expressly state that the beneficiary was a beneficiary for value, the fact I think may not be inquired into. How it would be if the policy did so state, it is not necessary to determine.

I have gone back to the original legislation, for I find that both sections are credited to 60 Vict. ch. 36 (O.). Looking at that chapter, I find that section 151 is said to be taken from 59 Vict. ch. 45, sec. 2 (2) (O.), as is also sub-

sec. 2 of sec. 160, which sub-section contains the proviso above stated. Judgment.

Rose, J.

Looking at sub-sec. 2 of sec. 2 of 59 Vict. ch. 45 (O.), I find the proviso there is that the assured shall not divert the insurance moneys or benefits "where the policy expressly states that the beneficiary was a beneficiary for valuable consideration."

I cannot understand why the form of expression was varied in 60 Vict. of sec. 151, from what appears in sec. 160. Having regard to the rule of construction, to which I have above referred, I think I must yield to the defendant's argument, and hold that section 160 is the section applicable. This would appear to be the better course from the fact that section 160 deals expressly with a case of a transfer from a mother to a wife, which is the case before me.

The facts of this case afford a very good illustration of the convenience of the provision that the policy shall declare on the face of it that the beneficiary is one for value, if the fact be so, for here we have a mother claiming to be beneficiary for value of a policy taken out by her son without communication with her, as I find the fact to be, held by him in his own possession until the time of his death, and taken out to run for at least a year concurrently with a prior policy in another company, which policy the mother said was given to her as a beneficiary for value.

The story of the mother, as I understand it, is that during the time when her son was being educated at the university, and for his profession as a physician, she, out of her own moneys, made advances to him which he promised to repay, and to secure which he took out a policy in the Foresters, naming her as beneficiary: that subsequently he allowed the policy in the Foresters to lapse, substituting this policy as security for the payment of the advances.

I cannot find as a fact that this policy was taken out in substitution. Its date was in July, 1893, and by a statement, put in since the trial, I find that in August, 1893,

Judgment. January, 1894, April, 1894, and August, 1894, the insured remitted premiums to the Foresters, so that the two policies ran together from July, 1893, until the first of March, 1895, when the insured was suspended for nonpayment of dues to the Foresters.

Rose, J.

The best opinion I can form upon the evidence is, that the policy in question was taken out without communicating with the mother; was not taken out in substitution for the policy in the Foresters but independently; was retained by the insured in his own possession; and that whatever was the position of the mother with regard to the policy in the Foresters she never was a beneficiary for value as to this policy.

The plaintiff's account of the dealings between her and her son was not at all clear. Her recollection was not trustworthy. She was unable to account for receipts and vouchers which were produced to her at the trial. The impression left upon my mind was that there had been a settlement between the mother and the son as late, at any rate, as 1891, as would appear from a receipt signed by the plaintiff in the words following: "Toronto, July 6th, 1891. Received from Robert B. Potts, notes in full for all claims I have had against him to July 1st, 1891."

Looking at the entries made in the books of the insured, I have formed the opinion that this indebtedness was wiped out, and that any payments made subsequently to the mother were by way of loan.

Of course I may be in error as to the conclusion I have formed; but if, notwithstanding the policy did not on its face declare the plaintiff to be beneficiary for value, it was my duty to find the fact, the plaintiff has not given me evidence which enables me to decide in favour of her contention that she was a beneficiary for value.

Had the plaintiff been content to have submitted her claim to the Court, without charging fraud and undue influence against the defendant, in selfish disregard of the suffering which the defendant must have been undergoing

by reason of the more than usually sad circumstances attending the loss of her husband, I might have been inclined to relieve her from payment of costs, but having charged fraud, and having failed in such charge, and having also failed as to the other issues sent down for trial, her claim must be dismissed with costs.

Judgment.

Rose, J.

G. F. H.

[DIVISIONAL COURT.]

REGINA V. THE TORONTO PUBLIC SCHOOL BOARD.

Sessions—Appeal to, from Order of Dismissal of Complaint—Offence under By-law—Municipal Act, R. S. O. ch. 223, sec. 551—R. S. O. ch. 90, sec. 7.

There is no appeal to the Court of General Sessions of the Peace from an order of dismissal of a complaint against a city by-law passed under the authority of sec. 551 of the Municipal Act, R. S. O. ch. 223.

The "order" referred to in sec. 7 of R. S. O. ch. 90, "The Ontario Summary Convictions Act," means an order against the party against whom the information and complaint is laid, and does not include an order of dismissal.

AN information and complaint was laid upon oath by one Andrew McFarren before the police magistrate of the city of Toronto, charging the Public School Board of the city with having in use a closet in the Church street public school without proper traps, vents, soil pipes or drains, and with allowing an accumulation of filth in and about the closet, and for allowing to be used a closet or such other contrivance or convenience, contrary to by-law 2478 of the city of Toronto, known as the Plumbing By-law, and contrary to the Public Health Act of the Revised Statutes of the Province of Ontario. Upon the return of the summons the parties appeared before the magistrate, who after hearing the evidence made an order dismissing the information and complaint. Andrew McFarren then appealed to the Court of General Sessions of the Peace for the county of York, from the order of dismissal, and on

Statement.

Statement. 23rd May, 1899, the appeal was allowed, the order of dismissal annulled and set aside and the Toronto Public School Board were convicted of an offence against the said by-law, the information and complaint being amended by striking out the words "known as the Plumbing By-law and contrary to the Public Health Act of the Revised Statutes of Ontario."

The judgment of the learned Chairman of the Sessions, with reference to the objection raised that the Sessions had no jurisdiction in an appeal from an order of dismissal, was as follows:—

"An initial objection was taken to the validity of these proceedings by way of appeal to the Sessions, on the ground that as the by-law was a regulation or law passed by the municipality under the powers conferred by section 551 of the Municipal Act (Ontario Statute), no appeal lay to the Sessions by a complainant or prosecutor from an order of dismissal, and the case of *Re Murphy and Cornish* (1881), 8 P. R. 420, is cited as an authority supporting that contention.

Upon reading ch. 74 of R. S. O. (1877), which was the statute under review by Mr. Justice Osler in the case of *Re Murphy and Cornish*, 8 P. R. 420, one finds that very important amendments have been made in that Act since January, 1881, the date when the decision was pronounced. Sub-sec. 1 of sec. 1 of that Act, referred only to a punishment or penalty inflicted by a justice of the peace; and sub-section 2 reserved a right of appeal to any person aggrieved by a conviction or order made by a justice of the peace, etc. Section 3, as pointed out by Mr. Justice Osler, limited the right of appeal to a person aggrieved by such conviction or order; and he also stated that the practice and procedure which were to apply to such appeals were to be the practice and procedure of appeals provided under the statutes of the Dominion then in force for an appeal to the General Sessions. He further called attention to the fact that the Dominion Statutes then in force regulating appeals to the Sessions used the same language practically as R. S. O.

ch. 74, (1877), allowing an appeal only to 'any person who thinks himself aggrieved by any conviction or order.' He cited other sections of the Dominion Act then in force to shew that it was not contemplated by the Dominion Act that an appeal was intended to be given to the prosecutor or complainant; and finally concluded his judgment by holding that an order did not include an order of dismissal of the complaint. Statement.

Since the decision in *Re Murphy and Cornish*, 8 P. R. 420, by 49 Vict. (1886) ch. 16, sec. 20 (consolidated now and preserved in R. S. O. (1897) ch. 90, sec. 4, sub-sec. 2), the magistrate or justice is expressly authorized instead of convicting or making any order, to make an order dismissing the information or complaint, and ordering the complainant to pay the defendant's costs.

Sub-section 3 now directs that such costs may be recovered in the same manner and under the same warrants as a penalty adjudged to be paid by the conviction or order is recovered.

Section 5 enacts that the foregoing sections shall apply to proceedings or orders under the authority of the Municipal Act, or by-laws of municipal councils passed thereunder.

Again, since the date of the judgment in *Re Murphy and Cornish*, 8 P. R. 420, the Dominion Statute regulating the practice and procedure as to appeals to the Sessions has also been amended.

Section 879 of the Code enacts, 'Unless it is otherwise provided in any special Act under which a conviction takes place, or an order is made by a justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order, the prosecutor or complainant, as well as the defendant, may appeal * * to the Court of General Sessions of the Peace.'

Under the present Revised Statutes of Ontario ch. 90, I do not think it can now be held that an order does not include an order of dismissal, and if a complainant feels

Statement. aggrieved by any such order of dismissal he can appeal to the Sessions. The practice and procedure of the Dominion Code also recognized an order of dismissal as an appealable order. The decision in *Re Murphy and Cornish*, 8 P. R. 420, must, therefore, I think, be considered as confined to the law as it stood in 1881, and is no longer an authority applicable to the existing statutes regulating or allowing appeals to the Sessions.

I, therefore, overrule the objection to my jurisdiction to entertain this appeal of the complainant, Andrew McFarren, from the order of dismissal made by the deputy police magistrate."

The information and proceedings before the police magistrate were brought before the Divisional Court upon *certiorari*, and the order of the Court of General Sessions of the Peace for the county of York, was filed.

On the 12th December, 1899, *F. E. Hodgins* moved absolute an order *nisi*, granted by this Court on the 8th day of September, 1899, to quash the said order on the following grounds :

1. There was no jurisdiction at the Sessions or of His Honour Judge McDougall to convict the Toronto Public School Board on an appeal from an order dismissing the information.

2. No appeal is given to a complainant or prosecutor from an order of dismissal.

3. The proceedings against the Toronto Public School Board should be by indictment, and not by information.

4. It is beyond the competence of the General Sessions of the Peace, or His Honour, Judge McDougall, to amend the information sworn to by the complainant from which an appeal was being taken.

5. No offence was proved, the plumbing by-law under which information was laid not covering the offence charged.

6. The by-law under which the alleged conviction was made, was a plumbing by-law, which does not deal with the system in use in the Church street school.

7. The proceedings should have been taken under the Public Health Act and city by-law 2477, and not under by-law 2478. Argument.

8. By-law 2478, if it covers such an offence as was charged, is *ultra vires* the city council.

9. By-law 2478 does not apply to a corporation such as the Toronto Public School Board, nor to a system installed before it was passed, nor one which has the approval of the medical health officer.

10. There was no evidence that the offence alleged was committed.

He referred to *McLellan v. McKinnon* (1882), 1 O. R. 219; *Regina v. Keepers of the Peace and Justices of the County of London* (1890), 25 Q. B. D. 357; *Payne v. Justices of the Uxbridge Division of the County of Middlesex and the Uxbridge Urban Sanitary Authority* (1881), 45 J. P. 327, 420.

J. E. Jones, shewed cause, and referred to *Regina v. Toronto R. W. Co.* (1898), 30 O. R. 44.

February 2nd, 1900. The judgment of the Court was delivered by

ARMOUR, C. J. :—

I think it quite clear that there was no appeal to the Court of General Sessions of the Peace from the order of dismissal of the information and complaint herein: that the Court of General Sessions of the Peace had, therefore, no jurisdiction to hear the appeal, and that the conviction and order of that Court must therefore be quashed.

The information and complaint was for an offence against a by-law of the corporation of the city of Toronto, passed under the authority of the Municipal Act, R. S. O. (1897) ch. 223, sec. 551.

Part 8 of the Criminal Code, which relates to summary convictions and to appeals therefrom, subject to any provision, otherwise, that is, by the Parliament of Can-

Judgment. ada, enacted with respect to such offence, act, or matter, Armour, C.J. applies only to (a) "every case in which any person commits, or is suspected of having committed, any offence or act over which the Parliament of Canada has legislative authority, and for which such person is liable, on summary conviction, to imprisonment, fine, penalty or other punishment"; (b) "every case in which a complaint is made to any justice in relation to any matter over which the Parliament of Canada has legislative authority, and with respect to which such justice has authority by law to make any order for the payment of money or otherwise": Criminal Code, part 8, sec. 840.

So that the authority, if any, for an appeal to the Court of General Sessions of the Peace, from an order of dismissal of an information and complaint for an offence against a by-law passed under the provisions of the Municipal Act, must be found in R. S. O. ch. 90, "The Ontario Summary Convictions Act;" and in section 7 of that Act, which provides that "any party who considers himself aggrieved by a conviction or order made by a justice of the peace, or by a police or stipendiary magistrate, under the authority of any statute in force in Ontario, and relating to matters within the legislative authority of the Legislature of Ontario, may, unless it is otherwise provided by the particular Act under which the conviction or order is made, appeal therefrom to the General Sessions of the Peace."

The "conviction or order" herein referred to, means a conviction or order of or against the party against whom the information and complaint is laid, and order, as here used does not include an order of dismissal.

I do not think that we ought to construe the words conviction or order to include an order of dismissal, but leave it to the Legislature to so provide, if it shall think proper to do so.

The words of the Imperial Act, 5 & 6 Wm. IV. ch. 50, sec. 105, are "That if any person shall think himself aggrieved by any rate made under or in pursuance of this Act, or by any order, conviction, judgment, or determina-

tion made, or by any matter or thing done by any justice, Judgment. or other person in pursuance of this Act, and for which no Armour, C.J. particular method of relief hath been already appointed, such person may appeal to the justices at the next General or Quarter Sessions of the Peace," etc.; and these words are much stronger in favour of an appeal from an order of dismissal than are the words of R. S. O. ch. 90, sec. 7; yet the Court in the case of *Regina v. Keepers of the Peace and Justices of County of London* (1890), 25 Q. B. D. 357, hold that they did not include an order of dismissal.

The order and conviction will thereupon be quashed.

No costs are asked for in the order *nisi*, and none are given.

G. F. H.

[DIVISIONAL COURT.]

WHITELOCK V. COOK.

Fraud—Landlord and Tenant—Pretended Sale of Goods by Tenant—Illegal Distress—Right of Tenant to Set Up Title to Goods.

A tenant is not precluded from setting up his title to goods illegally distrained for alleged fraudulent removal because of a pretended sale of them by him, the effect of which was to vest the possession but not the property in the goods in the alleged purchaser.

THIS was an appeal from the judgment of the County Statement. Court of the county of Oxford.

The action was by a tenant of a farm and his wife to recover damages for an alleged illegal distress of the plaintiffs' goods and chattels.

The male plaintiff rented a farm from the defendant for the term of one year from the 1st March, 1898, at the yearly rental of \$235, payable on the 1st January, 1899, with the privilege of continuing the tenancy for five years subject to the covenants in the lease.

On the 25th December, 1898, prior to the rent becoming due, the male plaintiff left the premises clandestinely,

Statement. removing a quantity of the goods and chattels thereon for the purpose of preventing them being distrained for the rent when it became due, and made pretended sales of them, as stated in the judgment. They were subsequently seized by defendant under a distress warrant issued on the 3rd of January, 1899, being after the rent had become due.

The learned Judge at the trial gave judgment in favour of the plaintiffs' holding that the distress was illegal and that the defendant was liable in trespass therefor, and assessed the damages at \$157.

In the subsequent County Court term, on motion therefor, this judgment was set aside, and judgment entered in favour of the defendant, dismissing the action.

From this judgment the plaintiffs appealed.

On January 18th, 1900, before a Divisional Court composed of MEREDITH, C.J., and ROSE, J., the case was argued.

Bicknell, for the plaintiffs. The learned County Court Judge has misconceived the action. He treated the action as one of trespass and as being governed by the old rules relating to that form of action, while the action was one of trover, and brought in question merely the ownership of the goods and not the question of their possession. The form of action, however, is immaterial now. The real transaction can always be shewn. It is proved here that there was no sale as a matter of fact, and that the goods never passed to the alleged purchaser, and the plaintiff was therefore entitled to set up his ownership. The goods were also exempted from seizure. The judgment should therefore be in the plaintiffs' favour: *Bowes v. Foster* (1858), 2 H. & N. 778; *Cochrane v. Moore* (1890), 25 Q. B. D. 57; *Taylor v. Bowers*, [1876] 1 Q. B. D 291; *Day v. Day* (1889), 17 A. R. 157.

D. E. Thomson, Q.C., contra. The goods undoubtedly

were fraudulently removed to prevent their being seized, **Argument.** and the plaintiff cannot take advantage of his own fraud to maintain an action against the defendant, who acted in good faith. The sale of the goods was valid, at all events of the bulk of them. There was an intention on the part of the plaintiff to pass the property in the goods, and this is sufficient, except as against creditors. The plaintiff failed to shew that the goods were exempt: *Am. & Eng. Encycl. of Law*, "Fraudulent Sale," vol. 8, 2nd ed., p. 856; *Kearley v. Thomson* (1890),⁶ *Times L. R.* 267. There was, however, more rent due than the amount of the damages recovered, and the defendant should have had judgment on his counterclaim.

February 8th, 1900. MEREDITH, C. J.: —

This is an action by a tenant and his wife against his landlord to recover damages for the unlawful seizure and sale of certain goods and chattels, all of which with the exception of two cows claimed by the wife, are alleged to have been the property of the tenant, and was tried by the learned Judge without a jury, and after the trial, judgment was given for the plaintiffs for \$157, at which sum the damages were assessed; but upon a motion by the defendant this judgment was ordered to be set aside, and instead of it a judgment dismissing the action to be entered; and it is from the latter judgment that the appeal has been taken.

It is clear upon the evidence that the goods in question were removed by the tenant from the demised premises for the purpose of preventing them from being distrained for the rent which was to become due on the 1st of January following the removal.

No rent having been in arrear when the goods were removed the landlord had no right to distrain them, though if the rent had been in arrear the removal would no doubt have been a fraudulent one within the meaning of the Act.

Judgment.

Meredith,
C.J.

The male plaintiff was, therefore, entitled to recover, unless it appeared in evidence, as it was contended by the defendant that it did appear, that the plaintiff had no right to the goods, or that he was precluded by his conduct from setting up a right to them.

It appeared from the testimony adduced at the trial that in furtherance of the purpose for which the goods were removed, different portions of them were placed in the possession of three different persons—a sale, or pretended sale, being in each case made. In two of the cases there was clearly no actual sale, but a mere pretence of one; and in the third case, that of the transaction with William West, though it is not so clear, the proper inference to be drawn from the facts adduced in evidence is that there was no real, but only a sham sale; and, having regard to the defendant's pleading that there was no real sale in any of the three cases, it was hardly open to him to ask for a different finding by the Court.

The result of this is, that the male plaintiff being the real owner was entitled to recover, unless he is, in consequence of the design in furtherance of which these transactions took place, precluded from asserting his ownership of the goods in this action.

The cases cited by Mr. Bicknell (*Bowes v. Foster* (1858), 2 H. & N. 779, and *Taylor v. Bowers* (1876), 1 Q. B. D. 291), seem to be conclusive against the defendant on this point. They decide that where the property in goods is not transferred, but the possession of them only parted with to a pretended but not a real purchaser, the transferor is not precluded from asserting and maintaining his title as against the pretended transferee though the object of what was done was to defraud creditors, if in fact no creditor has been defrauded. The latter of these cases has been in some respects questioned in *Kearley v. Thomson* (1890), 6 Times L. R. 267, but as I gather from the report its authority upon this point has not been impugned.

No rent having been due when the removal of the goods took place, the tenant had a legal right to remove them,

and there being no right in his landlord to seize them off the demised premises, there was none that could be defeated by a transfer to a third person. The goods were just as safe from seizure by the landlord as a distress for his rent while off the premises, had they been avowedly the goods of the tenant, as if they were really the property of a third person. This in itself would probably be a sufficient answer to the respondent's contention on this branch of the case.

Judgment.
Meredith,
C.J.

There was no satisfactory evidence that any of the goods were the property of the wife. She was not originally made a plaintiff, but was added at the trial; and there should be no recovery by her.

The learned Judge, in my opinion, for these reasons, erred in directing the judgment appealed from to be entered, and the appeal must, therefore, be allowed.

There is, however, a counterclaim by the defendant, which was not dealt with by the learned Judge owing to his decision being against the plaintiff, the counterclaim being for the rent due.

It will be proper, therefore, for us to remit the whole case (action and counterclaim) to the learned Judge to be dealt with by him (having regard to our decision as to the rights of the parties), so that he may deal with the counterclaim and the costs of the action, and make such order as to set off and otherwise as may be just and proper under all the circumstances.

There should be no costs of the appeal to either party.

ROSE, J., concurred.

G. F. H.

HAMILTON V. THE NORTHEY MANUFACTURING COMPANY.

Sale of Goods—Engine—Warranty for Return of Article.

Where in a contract for the sale of a gasoline engine and tank there was a warranty that if the engine would not work well, notice thereof was to be given to the defendants, stating wherein it failed, and giving a reasonable time to get to it and remedy the defect, and if such defect could not be remedied, the engine was to be returned to the defendant and a new engine given in its place :—

Held, that the plaintiff's remedy under such warranty was for the return of the engine and its replacement by another engine, and not for damages for breach of warranty.

Statement. THIS was an action tried before FERGUSON, J., without a jury at Woodstock on the 19th and 20th December, 1899.

A. S. Ball, and S. G. McKay, for the plaintiff.

J. R. Roaf, for the defendants.

The action was brought to recover damages for the alleged breaches of a contract for the purchase and sale of a thirty-five horse power gasoline engine.

The plaintiff on the 26th October, 1898, signed the defendants' usual printed form of order, which was addressed to the defendants, and was as follows :—

"Please supply me with one thirty-five horse power engine and ship to Brighton station about eight weeks from date; also one iron tank; for which I agree to pay the sum of \$1,050; \$150 cash on setting up the engine; \$300 at sixty days thereafter; \$300 at six months thereafter; and \$300 at three months thereafter; interest at 6%, payable on the day of

"This engine to be warranted as per manufacturer's printed warranty endorsed thereon; and I agree to settle for it on above terms, and as per agreement and warranty; and I acknowledge having received a true copy of this order, agreement and warranty, as endorsed on back hereof.

"I agree not to rescind this order or agreement; and, in the event of my attempt to do so, or refusal to accept

delivery of the engine, the company shall be entitled to recover from me, in the Court having jurisdiction where the Toronto office of the company is situated, such damages as it may sustain by reason thereof. Statement.

"I also promise and agree to furnish further security satisfactory to you, at any time, if required. If I fail to furnish such security when demanded, or if I make any default in payment, or should I dispose or attempt to dispose of my land, or any part thereof, or of my personal property, you may then declare the whole price due and payable even before other maturity by promissory note or otherwise of the same, and suit therefor may be immediately entered, tried, and finally disposed of in any Court having jurisdiction where the Toronto office is located, and you may retake possession of the engine or property so sold to me without process of law, and at any time thereafter, without notice to me may sell the same at public auction or private sale, the proceeds thereof, less proper charges of retaking possession and sale, to be applied on account of the amount of the purchase price and interest then unpaid; such sale, or right to sell, shall in no way affect or limit my liability for the full purchase price, or your right to sue for and recover from me said full purchase price and interest, except that in the event of sale I shall receive credit on account, as before provided, and shall, thereafter, be liable to pay the balance only. Upon such sale, if any, my right to possession and delivery before and after full payment and all my other rights and claims thereto shall forever cease. Subject to these provisions I am to have possession and use of the engine or property at my own risk of damage or destruction* from any cause whatsoever, but the property therein, and the title thereto, is not in any event to pass to me, on the contrary, shall remain in you until full payment of the purchase price and interest or any obligation or renewals thereof given therefor."

On the back of the contract was the following endorsement:—"This engine is made of good material, and with

Statement. proper management, it is capable of doing good work. The purchaser shall have one day to give it a fair trial, and if it should not work well, he is to give written notice stating wherein it fails to the agent through whom it was ordered, and allow reasonable time to get to it and remedy its defects, if any, the purchaser rendering necessary and friendly assistance, when, if it cannot be made to do good work, he shall return it to the place where received, free of charge, in as good condition as when received except the natural wear, and a new engine will be given in its place, or the notes and money will be refunded. Should any part of the engine break during the first year, through defective material or workmanship, and by fair usage, it shall be replaced free of charge when the broken parts are returned to us or the agent through whom the engine was purchased. Continued possession of the engine, or failure to give notice as above, shall be conclusive evidence that the engine fulfils the warranty."

By the terms of the order it was stated that the order was not to be binding on the defendants until received and ratified by them, and was subject to the warranty and agreement endorsed thereon.

The order was received by the defendants on the day it was signed ; and the company, on the same day, wrote to the plaintiff the following letter, which was duly received by him :—

" October 26th, 1898.

Mr. James M. Hamilton,
Bright, Ont.

Dear Sir:—We have much pleasure in confirming arrangement made with you to-day, by which we sell you one of our thirty-five horse power gasoline engines, together with wrought iron tank now lying in our yard, the latter to be provided with a cast iron or other cover and made suitable in every way for containing gasoline, for the sum of ten hundred and fifty dollars (\$1,050).

Engine to be fitted with our usual equipment of electric igniter and self-starter, and is to be made to work with

seventy-four degree gasoline. The full equipment of engine will be: Engine complete; one battery; one charging material; spark coil and switch and wiring complete; gasoline pipe connections, 35 feet; water tank and pipe connections, 10 feet; including shut off cocks and flexible hose, 4 feet long; exhaust pipe and fittings, 10 feet; one muffler, complete; one driving pulley, 37x20; one monkey wrench; one alligator wrench; one oil can; one gallon can of lubricating oil. Statement.

We also agree to send one of our men, free of expense, to you, to start engine and supervise setting up of same, this time not to exceed three days.

The above price is F. O. B. Toronto, and does not include any details not mentioned in the above specification; and the terms of payment are as follows:—\$150 payable in cash as soon as engine is started to your satisfaction; your sixty days acceptance from date of first payment for \$300, and your acceptance at three and six months from due date of the sixty days acceptance. We shall load tank and engine on a flat car, complete in every detail, and ship to you in about eight weeks from date. The time of delivery is not absolutely guaranteed, but we shall use our utmost endeavours to be within that time.

Trusting you will have the utmost satisfaction in every detail, with this machine, we remain, with thanks,

Yours very truly,

The Northey Mfg. Co., Ltd.

(Sgd.) H. S. Pell, Sec'y-Treas."

The learned Judge reserved his decision and subsequently delivered the following judgment in which the additional facts so far as material are set out.

December 30th, 1899. FERGUSON, J.:—

The plaintiff brings the action to recover damages from the defendants, for alleged breaches of a contract for the purchase and sale of a thirty-five horse power gasoline engine.

Judgment. The plaintiff was the purchaser, and he alleges that the defendants did not furnish him with an engine in accordance with their agreement, by reason of which he suffered damages.

At the trial, counsel for the plaintiff was placing his reliance upon the letter signed by or on behalf of the defendants, bearing date the 26th day of October, 1898, when defendants' counsel raised an objection based upon Rules 469, 470 and 471,* and a notice given by the defendants under the same, to which no attention had been paid or response given or sent.

The plaintiff's counsel admitted that he had received the notice, but had not paid any attention to it, saying that he had forgotten the provisions of these rules.

After some discussion on the subject, I offered the view that the two documents, this letter signed by the defendants, and a document of the same date signed by the plaintiff, and given by him to the defendants, were the evidence of the contract, to the exclusion of the prior correspondence between the parties.

After further discussion, counsel agreed that this was the true view, whereupon counsel for the defendants withdrew or waived his objection, saying that he was willing to proceed with the trial on this footing, and the trial was then proceeded with.

The circumstances of these documents coming into existence, so far as such circumstances seem to me material, are these:—The plaintiff had seen some of the advertising pamphlets of the defendants, and he, desiring to have an engine, correspondence took place between the parties. As a consequence of this, the plaintiff, pursuant to arrangement, came from his residence at Bright, in the county of Oxford, to see the defendants about the purchase of an engine and while here (in Toronto), the defendants delivered to him the letter of the 26th October, 1898, signed by

*These Rules relate to notice to produce for inspection of documents referred to in pleadings.

them, and at the same time the plaintiff signed and delivered to the defendants the document of the same date. These documents seemed to me to be, and I still think were, the final result of the bargaining between the parties; and they, as I think, afford the evidence of the contract they made.

Judgment.
Ferguson, J.

The engine was sent to the plaintiff. There was some complaint that it was not sent in good time; but I think I may pass over this, as there was some evidence respecting compromises as to time, and the plaintiff was willing, as he said, to go on with the contract, if the engine had worked satisfactorily. There were also differences between the parties as to the distances that the engine had by its pumps to draw the gasoline and the water through respective pipes, the perpendicular distance from which these materials had to be so drawn, and as to what were the reasonable and proper distances in all the circumstances. These differences, I may, in the view that I have taken of the case, also pass over without discussion. The engine was set up and tried by the plaintiff, and by the defendants' agents. The plaintiff said and contended that it did not work satisfactorily. The defendants' agents were of the opinion that it did work satisfactorily, or at least that it would so work if properly treated.

Although there were contentions respecting a crack in the water jacket, and a small groove cut on the inside of the cylinder of the engine—supposed to have been done by the head of a bolt, it not being shewn with any degree of clearness whether these took place before or after the delivery of the engine—the plaintiff's complaint and contention was that the engine did not work and could not be made to work satisfactorily. He so put his complaint and contention himself. He said the engine did not do good work, and could not be made to do good work, explaining at some length his reason for arriving at this conclusion. This, however, is a matter that is provided for in the contract of purchase, for in the document of the 26th of Octo-

Judgment. ber, 1898, signed by the plaintiff, and delivered by him to the defendants, it is provided that if, after trial, as pointed out, the engine cannot be made to do good work, the purchaser should return it to the place where he received it, free of charge, in as good condition as when received, except natural wear, and that a new engine would be given in its place, or the notes and money refunded. (In this case, however, the plaintiff had not given any notes, or paid any money.) The plaintiff having found, as he says that the engine did not do, and could not be made to do, good work, did not return it, or attempt to do so, but left it in position on property that came into the hands of a stranger to the contract, from or through whom the defendants acting, as against the plaintiff, under other provisions in the agreement, obtained possession of it in, as defendants say, a very dirty and neglected condition.

Let it be assumed that the plaintiff is entirely right in his contention that the engine would not and could not be made to do good work (there is no doubt and his conduct shews that he is sincere in the contention), then the case arising is most specifically provided for in the contract and he should have returned the engine in accordance with such provision and demanded another one, or a return of whatever he had paid, if he had paid anything.

I think the principles laid down in the case *Hinchcliffe v. Barwick* (1880), 5 Ex. D. 177, indicate and shew that this was his sole remedy, and there are other authorities to the same effect.

So far as I am able to see, another remedy could not be given here without abolishing part of the contract, or making a new contract for the parties.

Other matters of law were argued, such as the difficulty in maintaining an action for breach of warranty where the property in the article warranted did not pass to the purchaser; but I do not deem it necessary to discuss these here.

I place my conclusion upon the one ground, namely, that according to the contract, in the event that the

plaintiff says happened, he had but the one remedy, and he did not choose to avail himself of this. Judgment.
Ferguson, J.

I think the action should be dismissed, and it is dismissed with costs.

Action dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

NORTHEY MANUFACTURING COMPANY V. SANDERS.

Sale of Goods—Specific Article—Warranty—Parol Evidence.

Under a written contract for the sale by description of a specific article, namely, a gasoline engine with a pump standard, it not being pretended that it did not answer such description, such contract must be taken to cover, as it purported to do, the whole contract between the parties, and parol evidence is not admissible to shew a warranty made prior to the entering into of the contract which is inconsistent with the written warranty, as it would be allowing the admission of parol evidence to control, vary, add to or subtract from the written contract; and statements alleged to have been made by the vendors, and acted on by the purchaser, to the effect that the engine would pump sufficient water for a certain number of horses and cattle were not such as to constitute a separate and independent collateral agreement, and admissible in evidence as such.

THIS was an appeal from the judgment of the senior Judge of the County Court of the county of York, setting aside a verdict and judgment therein for the defendant, and directing a new trial. Statement.

The action was brought for the price of a gasoline engine sold by the plaintiffs to the defendant under a written contract which is briefly set out in the judgment of STREET, J., and which was similar in form to the one set out in the case of *Hamilton v. Northey Manufacturing Co.*, ante p. 468.

The judgment of the learned County Judge was as follows:—

Judgment. McDougall, Co. J. :—

**McDougall,
Co. J.**

This is an action brought by the plaintiffs to recover \$145.20, the price of a gasoline engine and some belting, sold under the terms of a written contract to the defendant. The defendant denies the contract set up, and also counter-claims for damages for the failure to deliver an engine which would pump sufficient water for his (the defendant's) stock of 250 head of cattle and 18 horses.

The case was tried before Morgan, Junior Co. J., and a jury; and the jury rendered a general verdict for the defendant on the plaintiffs' claim; and found for the defendant against the plaintiffs \$75 damages on the counterclaim.

Upon reading the evidence and the charge of the learned Judge to the jury I fear there will have to be a new trial.

The learned Judge told the jury that if they found that the plaintiffs made a verbal representation to the defendant at the time of or before the signing by the defendant of the written contract produced in evidence, that the engine in question would do the work required by the defendant to be done in the matter of pumping sufficient water for his live stock, and that such engine did not when attached to the pump efficiently work the pump and cause it to pump sufficient water, the plaintiffs could not recover the price of the engine, and that the defendant was entitled to damages upon his counterclaim.

I do not think this is a correct statement of the law. This was the sale of a specific chattel upon the terms of a written contract. The article was delivered, and under the terms of the contract and written warranty on the contract, the purchaser was to have one day to give it a fair trial, and if it did not work well he was to give a written notice of its defects, etc., to the plaintiffs, who were at liberty to make the same good. The article was delivered; no written notice of its defects was given by the defendant, and, after retaining the engine a couple of weeks, the defendant returned it to the plaintiffs, who

refused to accept it, and it is now lying in their yard subject to the defendant's order. There was no right on the part of the defendant to rescind the contract except upon the terms of the warranty. Not having pursued these terms, the defendant had not the right to rescind except with the consent of the plaintiffs. The defendant in this case, even if there had been a prior representation that the engine would when connected with the pump raise sufficient water for the defendant's purposes, had chosen by accepting the terms of the express written warranty to limit his right of rejection to a one day's trial, and, under the stipulation, to give a written notice of any defect or state any other ground of complaint.

Judgment.
McDougall,
Co. J.

The position of a defendant who has so limited his right to rescind by the terms of a written warranty, even where the property had not passed, is dealt with in the case of *Tomlinson v. Morris* (1886), 12 O. R. 311. There it was held that the plaintiff, the buyer in that case, not having given the written notice within the time limited in the warranty, was not at liberty after the expiration of the time to rescind the contract.

A purchaser of goods with a warranty is not at liberty, if the warranty be broken, to return the goods, unless his right to do so is expressly provided by the contract. In the absence of any such stipulation he is left to his remedy by suit on the contract, or by way of defence, to reduce the price in an action brought on the contract : *Hinchcliffe v. Barwick* (1880), 5 Ex. D. 177.

It may be remarked in the present case that the difficulty experienced in working this engine, as I gather it from the evidence, arises apparently from some defect in the gearing which transmitted the power or motion to the pump, and the effect of which was to drive the pump at too high a rate of speed.

It does appear to me that this was a matter which could have been readily remedied by a change in the size of the pulleys or some different adjustment of them. The defendant could have protected himself by a prompt written notice.

Judgment. The rights and remedies of the parties having, in my
McDongall, judgment, not been properly placed before the jury, there
Co. J. must, therefore, be a new trial. The costs of this motion
to be costs in the cause.

From this judgment the defendant appealed to the
Divisional Court.

On December 12th, 1899, before a Divisional Court
composed of ARMOUR, C. J., FALCONBRIDGE and STREET,
JJ., the appeal was argued.

Mills, for the appellant.
J. R. Roaf, contra.

December 28th, 1899. ARMOUR, C. J.:—

In this case there was no evidence of any fraud or
fraudulent representation entitling the defendant to rescind
the contract. Nor were the representations if made such
representations as would entitle the defendant to rescind
the contract.

In *Kennedy v. Panama, etc., Mail Co.* (1867), L. R. 2 Q.
B. 580, it was held that in order to entitle a party to rescind
a contract it is sufficient to shew that there was a fraudu-
lent representation as to any part of that which induced
him to enter into the contract. But where there has only
been an innocent misrepresentation it is not a ground for
rescission, unless it was such as that there is a complete
difference in substance between the thing bargained for
and that obtained so as to constitute a failure of consid-
eration.

I am also of opinion that evidence of the alleged repre-
sentations contravened the rule that parol testimony
cannot be received to contradict, vary, add to or subtract
from the terms of a valid written instrument.

But, even if properly received, it was not shewn that the
representations were untrue, for it was not shewn that if

the engine had worked well it would not have fulfilled the representations. Judgment.

Armour, C.J.

And the defendant's remedy if any, is thus brought back to the written contract between the parties and to the warranty therein contained.

The appeal must be dismissed with costs.

STREET, J.:—

On 8th July, 1898, the plaintiffs, after some previous conversations and negotiations, signed an order the material parts of which are as follows:—

“Toronto, July 8, 1898.

The Northey Mfg. Co., Limited, Toronto, Ontario.

Gentlemen:—

Please supply me with one one horse power gasoline engine and pump standard, July 16, 1898, for which I agree to pay the sum of \$140, in payment as follows: When engine is tested you give us note at two months from July 30. This engine to be warranted as per manufacturer's printed warranty indorsed hereon * * .

(Sgd.) Henry Sanders.”

On the back was endorsed the following:

“This engine is purchased and sold subject to the terms of agreement signed by purchaser and to the following warranty and agreement. This engine is made of good material and with proper management it is capable of doing good work. The purchaser shall have one day to give it a fair trial, and if it should not work well he is to give written notice stating wherein it fails, to the agent through whom it was ordered and also to the Northey Manufacturing Company, Limited, Toronto, Ontario, and allow reasonable time to get to it and remedy the defects if any, the purchaser rendering necessary and friendly assistance, when, if it cannot be made to do good work he shall return it to the place where received free of charge in as good condition as when received except the natural wear, and a new engine will be given in its place or the

Judgment. notes and money will be refunded, * * Continued possession of the engine or failure to give notice as above shall be conclusive evidence that the engine fulfils the warranty. (Sgd.) The Northey Manufacturing Company Limited."

Street, J.

No agent has authority to change the above warranty.

In accordance with this contract a one horse power gasoline engine and pump standard were delivered to the defendant, at the plaintiffs' works, and were taken by him to the defendant's farm where they were put up, and having been connected with a pump purchased elsewhere by the defendant, were set running by a workman of the plaintiffs' sent there for the purpose. The running being unsatisfactory to the defendant, he says that the workman went away promising to return on the following Monday, and that he did not do so. The defendant then went into the plaintiffs' works and had a conversation with the manager, of which the manager and the defendant give different accounts, the manager saying that the defendant refused to allow him to send a workman out to see what was wrong, and the defendant denying this.

About a fortnight later on 17th August, the defendant wrote to the plaintiffs.

"Sir,—Waited almost four weeks for you to send a man out to put engine in order, but no person came. Now have set it aside and wish you to take engine away at once or I will bring it into the factory, if say so. It is here at your wish.

(Sgd.) Henry Sanders."

On 24th August the plaintiffs replied reminding the defendant that he had refused to allow any one on his place to start the engine running; but stating their willingness, and offering to send a man up to start the engine, if he requested it.

On 29th August, at about seven in the morning, without further interview or correspondence, the defendant left the engine, etc., at the plaintiffs' works, and wrote them that he had done so. On the 31st August, the plaintiffs wrote

the defendant refusing to accept the return of the engine, and asking the defendant to remove it, and offering again to shew him that it would work perfectly. The defendant having taken no notice of their letter, the present action was brought on 11th October, 1898, to recover the price at which it had been sold.

Judgment.
Street, J.

At the trial before E. Morgan, Esq., junior Judge of the county of York, the defendant was allowed to give evidence of representations, which he alleged the plaintiffs' manager had made to him in conversations which preceded the making of the contract to the effect that the engine would, when attached to the pump which was used, pump water sufficient to supply 250 head of cattle, and the jury were told in substance that if they believed this story the plaintiffs could not recover. They were further told that if they believed this story, the defendant was entitled to recover upon his counterclaim the damages he had been put to in watering his stock by other means while waiting for the plaintiffs to put the engine in working order. The jury were further told that the provision on the face of the contract that a note was to be given at two months when the engine was tested, meant a testing in operation upon the work for which it was with the knowledge of both parties purchased.

At the conclusion of the charge, and of certain objections made to it by the defendant's counsel, the plaintiffs' counsel objected to the charge, pointing out the provisions of the warranty endorsed on the contract and the steps required to be taken by the defendant in case he desired to complain that the engine had failed to do the work for which it was intended.

The jury found a verdict for the defendant upon the plaintiffs' claim, and a verdict for \$75 damages for the defendant upon his counterclaim.

The plaintiffs thereupon applied for a new trial to J. E. Macdougall, Esq., Judge of the County Court of York, and after argument judgment was delivered by him setting

Judgment. aside both verdicts, and ordering a new trial, the costs of the motion to be costs in the cause.
Street, J.

From this judgment the present appeal has been brought by the defendant.

In my opinion the order appealed from is right. The sale was of a specific article by description and the contract must be taken to cover, as it expressly states on its face that it does, the whole contract between the parties. The article which the plaintiffs undertook to deliver was a one horse power gasoline engine with pump standard, and it is not pretended that the article supplied does not answer this description. The objection is that it did not perform certain work, which is not referred to in the warranty endorsed upon the contract, but which the defendant swore the plaintiffs verbally told him it would do, and the jury were told that the plaintiffs would be bound by the verbal warranty as well as by that contained in the contract if they believed it to have been made.

I think this direction was wrong, and that the attention of the jury should have been confined entirely to the terms of the warranty endorsed on the contract; and they should further have been told that the defendant's remedies and the course to be taken by him in case the engine did not do good work within the meaning of the warranty were those set forth in the warranty itself. I agree with the learned Judge's view that the testing intended by the terms of the contract as a preliminary to the giving of the note must be taken to be the trial provided for by the warranty, but the provision with regard to it must be read in connection with the concluding paragraph of the warranty.

It was suggested during the course of the argument, although the point can hardly be said to have been pressed, that the statements and representations alleged to have been made by the defendants amounted to a separate and independent parol agreement which was valid under the authority of cases of the class of *Morgan v. Griffith* (1871), L. R. 6 Ex. 70.

No case of this kind is, however, set up in the pleadings ;

nor is there, in my opinion, any thing in the evidence at the trial to justify an amendment allowing it to be set up, nor was such a question submitted to the jury at the trial as one of the matters before them, nor could it, in my opinion, properly have been submitted to them upon the evidence.

Judgment.
Street, J.

The appeal should be dismissed with costs.

FALCONBRIDGE, J.:—

I agree that the appeal should be dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

ROYAL VICTORIA LIFE INSURANCE COMPANY V. RICHARDS.

Damages—Life Insurance—Premium Payable on Presentation of Policy—Non-acceptance of Policy.

By an application for a policy of insurance on the defendant's life he bound himself to pay the first premium on the presentation of the policy; but it was also agreed that the company should not incur any liability until the premium had been actually paid and received by the company. The application was accepted by the company and a policy issued and tendered to the applicant, who refused to accept it:—

Held, that the company could not claim the whole amount of the premium as liquidated damages, but were entitled to such damages only as had been occasioned by the defendant's refusal to accept the policy.

THIS was an appeal from the judgment of the Judge presiding in the First Division Court of Northumberland and Durham. Statement.

The defendant signed an application to the plaintiffs for an insurance upon his life which contained the following, amongst other agreements, on his part: "I hereby agree and bind myself to pay the first premium on presentation of the policy herein applied for. I agree, on behalf of myself, and of any person who shall have or claim any interest in any policy issued under this application, as follows:—That the company shall incur no liability, under

Statement. this application, until it has been received and approved, the policy issued thereon by the company at the head office, and the premium actually been paid to and accepted by the company or its authorized agent during my lifetime and good health."

The application was received and approved of by the company, and a policy was issued at the head office and sent to the local agent, who tendered it to the defendant demanding the premium. The defendant told the agent that he had changed his mind, and did not intend, or was unable, to pay the premium or to take up the policy, and it was never delivered to him. The defendant then went to the company's medical adviser and paid the fee charged by him to the company for his examination of the defendant for the purposes of the policy.

The company then sued in the Division Court for \$26.55, the balance of the premium, after allowing the medical fee he had paid of \$2.75. The Judge of that Court assessed the damages sustained by the plaintiffs, by reason of the defendant's breach of his contract at \$2, being the actual expense which the plaintiffs had been put to, and refused the plaintiffs' application for a new trial to reconsider his judgment.

The parties then filed a written consent to an appeal to the Divisional Court under sub-sec. (2) of sec. 154, of the Division Courts Act.

Riddell, Q. C., for the appellants. The contract entered into between Richards and the agent of the company was that he was to pay the premium on presentation of the policy. Immediately on presentation of the policy to the defendant the premium became due. The acceptance of the policy by the defendant was not a condition precedent. The learned County Judge erred in treating the matter as one of damages merely: *Susquehanna Mutual Life Co. v. Leavy* (1890), 136 Penn. St. 499; *Joyce on Insurance*, sec. 1356 *et seq.*; *Sun Life Assurance Co. v. Page* (1888), 15 A. R. 704; *Edge v. Stratford* (1831), 1 Cr. & J. 395; *Thomson v. Weems* (1884), 9 App. Cas. 671,

682; *Adams v. Hagger* (1879), 4 Q. B. D. 480; *Straton v. Rastall* (1788), 2 T. R. 366; *Blackburn v. Smith* (1848), 2 Ex. 783; *Clark v. Lazarus* (1840), 2 M. & G. 167; *Coltins v. Price* (1828), 5 Bing. 132.

No one appeared for the respondent.

January 10th, 1900. ARMOUR, C. J. :—

There is no distinction to be drawn between the breach of this contract and the breach of any other contract, and the damages assessable are such as fairly and reasonably may be considered as arising naturally from the breach according to the well-known rule laid down in *Hadley v. Baxendale* (1854), 9 Ex. 341.

The damages were properly assessed in the Court below, and the appeal must be dismissed.

STREET, J. :—

In my opinion the judgment appealed from is right, and should not be disturbed.

The contract relied on by the plaintiffs is the defendant's promise to pay "the first premium on presentation of the policy," but they go on to stipulate that they shall incur no liability until the premium has been paid, and the admissions shew that they insisted upon this latter stipulation by refusing to deliver the policy without payment being made of the first premium. They cannot be allowed to say "You owe us the first premium upon an insurance upon your life," and at the same time, "We never insured your life because you refused to pay us the first premium."

There is nothing indicating that the amount of the first premium is to be treated as liquidated damages for the defendant's breach of contract which is really what the plaintiffs are contending; and they must, therefore, be limited to their actual damages which have been properly assessed: *Canning v. Farquhar* (1886), 16 Q. B. D. 727; *Sun Life Assurance Co. v. Page* (1888), 15 A. R. 704.

As no one appeared to support the appeal there will be no costs.

[DIVISIONAL COURT.]

REGINA V. MCGARRY.

Intoxicating Liquors—Former Conviction—Proof of by Parol—R. S. O. ch. 245, sec. 101, sub-secs. 1 and 2.

Under sub-secs. 1 and 2 of sec. 101 of the Liquor License Act, R. S. O. ch. 245, it is not necessary that the proof of the prior conviction should be by the production of the formal conviction or by a certificate thereof, other satisfactory evidence being by the statute declared to be sufficient.

Where, therefore, on a trial before a magistrate who was the same magistrate by whom the defendant had been previously convicted of a like offence,—the information alleging such prior conviction, and all that appeared with regard to it was the evidence of the license inspector, who proved that the defendant was the person previously convicted :—

Held, it must be assumed that the magistrate satisfied himself as to the prior conviction, the inspector's evidence only being necessary to prove the identity of the defendant.

Statement. THIS was an appeal from the judgment of FALCONBRIDGE, J., dismissing a motion by the defendant for the issue of a writ of *certiorari*, with a view to quashing a conviction of the defendant by the police magistrate, in and for the city of Toronto, for selling liquor without a license.

The defendant was convicted of selling liquor without a license on the 7th October, 1899. The information charged that the defendant was previously, to wit on the 28th October, 1895, before the same police magistrate, convicted of having sold liquor without a license on the 20th September, 1895.

The evidence as to the previous offence was as follows :
“Thomas Dexter, License Inspector, sworn, states—I know defendant. He is the party who was convicted as charged in the second paragraph of the present information. He is called McGrath sometimes.”

The learned Judge dismissed the motion with costs.

From this judgment the defendant appealed.

On January 15th, 1900, the appeal was argued before a Divisional Court composed of MEREDITH, C.J., and ROSE, J.

J. D. Godfrey, for the defendant. There was no sufficient **Argument.** evidence under R. S. O. ch. 245, sec. 101, sub-secs. 1 & 2 as to the previous conviction. Either the original record of the conviction, or a certificate thereof pursuant to section 101, should have been produced: Criminal Code, secs. 505, 694; *Regina v. Fox* (1868), 10 Cox C. C. 502; *Regina v. Somers* (1869), 11 Cox C. C. 248; *Cross v. Watts* (1862), 13 C. B. N. S. 239; *Allbutt v. General Council of Medical Education and Registration* (1888), 23 Q. B. D. 400; *Regina v. Kennedy* (1885), 10 O. R. 396, (1889), 17 O. R. 159.

Langton, Q.C., *contra*, was not called on.

MEREDITH, C. J. :—

We think this order must be affirmed. If I were dealing with the case in the first instance, and not by way of appeal, I should come to the same conclusion as my brother Falconbridge.

If it were not for the statute, Mr. Godfrey's argument would probably have prevailed. I think the statute was passed to prevent just such objections as this prevailing. Having regard to the loose way in which proceedings are very often conducted in magistrates' courts, provision is made that besides the formal conviction or certificate, other satisfactory evidence is to suffice.

I think we must take it that the magistrate looked up his record, the previous conviction having been made before him; the evidence of Dexter supplied all that was wanted, that the defendant was the same person who had been previously convicted.

ROSE, J. :—

I think we are but extending the principle of the decision in *Regina v. Kennedy* (1889), 17 O. R. 159, in following the opinion just expressed by the learned Chief Justice, to which I agree.

Appeal dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

GARDNER V. CANADIAN MANUFACTURER PUBLISHING CO.,
LIMITED.*Company—Directors—Invalid Resolution—Payment of Creditors.*

By the by-laws of an incorporated company the board of directors was to consist of three persons, two of whom constituted a quorum. At a meeting, at which two of the directors, C. and G., the plaintiff, were present, one being the president and the other the secretary of the company, a resolution was passed that "The matter of the compensation of C., the editor, and G., the advertising solicitor, of the company was considered, and the sum of \$1,000 each be ordered to be placed to their respective credits in the books of the company for services rendered during the year 1895 in addition to their regular salary, and to be charged to their salary account." C., as a matter of fact, had not been appointed editor, or G., as advertising solicitor, the object of the resolution being to appropriate all the funds of the company, and to prevent a stockholder, who owned the greater part of the stock, and had made a claim against the company, being paid :—
Held, that the resolution could not be sustained, nor could any moneys received under it be retained.

Statement.

THIS was an action brought to recover from the defendants, first, the amount of their promissory note for \$200, dated 18th June, 1897, payable to the plaintiff with interest; and second, arrears of salary as manager and canvassing agent due to the plaintiff at \$25 per week to 2nd September, 1898, amounting to \$690.07.

The defendants denied their indebtedness; and counter-claimed, or asked to be allowed to set off, against the plaintiff's claim a sum of \$1,000 received by the plaintiff under colour of a resolution of the directors of the company, dated 24th March, 1896.

The action was tried before ROSE, J., without a jury, at Toronto, on the 7th October, 1898, who reserved his decision, and subsequently delivered the following judgment, in which the facts, so far as material, are set out.

February 2nd, 1899. ROSE, J.:—

I have come to the conclusion that the action of the plaintiff and of Cassidey was not a *bond fide* exercise of

any power vested in them by statute as directors of the company: that the vote of \$1,000 to each of them was not by way of remuneration for services rendered or as salary; but was in fact, as stated by Cassidey, an endeavour to withdraw from the assets of the company \$2,000 so as to prevent Nicholls from obtaining the same as fruits of his judgment in the action pending against the company in which Cassidey and Gardner were defendants.

Judgment.
Rose, J.

Cassidey in giving his evidence said substantially as follows: "That one Nicholls had instituted a suit against the company, and against him and Gardner; and that he and Gardner believed that the object of the suit was to wreck the company: that he (Cassidey) and Gardner had been working hard and had succeeded in getting together a surplus of something like \$2,000; and that they feared that Nicholls would come in with his suit, and that that would be swept away; and, as they thought they ought to enjoy the fruits of their labour, they divided the surplus between them, voting \$1,000 to each on the understanding that the money was to be withdrawn as was reasonable, that is, as the money came in."

I think that this is also the fair result of the evidence of the plaintiff. His answer to the question, "What led to the passing of the resolution?" was, "Well, we had been working very hard, and I expected that when there was a profit shewn it would take the form of an increase of salary." At the time this meeting took place Mr. Cassidey called a meeting, and put it in this way, "increase of salary."

The resolution was in these words: "The matter of compensation of the editor, Mr. Cassidey, and Mr. Gardner, the advertising solicitor of the 'Canadian Manufacturer,' was considered; and it was decided that the sum of \$1,000 each be ordered to be placed to their respective credits in the books of the company for services rendered during the year 1895, and in addition to their regular salary, the same to be charged to salary account." As a matter of fact, Cassidey was the president, and had not

Judgment. been appointed editor ; and Gardner was the secretary, and
Ross, J. had not been appointed advertising solicitor.

At this meeting, Cassidey and Gardner were the only persons present. If there had been \$2,000 in cash on hand they would have simply withdrawn it and divided it between them. The sum was not fixed with relation to the value of the services rendered, but was fixed at an amount which would practically exhaust the profits made up to that time.

It is perfectly clear that such action was not in good faith as against Nicholls and the stock which he held, and was not warranted by anything in the charter, the statute or the by-laws, and could not have been done except with the assent of all the shareholders, which was not obtained.

I cannot find, on this evidence, that Nicholls had any notice, for, having regard to his suit against the company, a copy of the pleadings in which has been put in, it would be marvellous if he would have permitted this attempt to succeed, had it become material to his interests to attack the proceedings when he became aware of it. That suit was settled, and the stock became the property of Mrs. Cassidey. I cannot find on the evidence, in face of her statement to the contrary, that she knew of the fact or acquiesced in it after she became a shareholder. The onus is on the plaintiff to establish such conduct on her part as would prevent her from raising this question. He has not given me evidence upon which I think I ought to act.

It is, of course, a little difficult to understand, in the ordinary course of events, how this could have been done by her husband and she know nothing of it. But the fact that it is extraordinary alone does not warrant me in rejecting her statement and acting upon an inference to the contrary drawn from the evidence of the plaintiff.

It seems manifestly unfair that an order should be made against the plaintiff to pay back to the company the moneys which he has drawn under this agreement between himself and Cassidey, while the company is

taking no proceedings against Cassidey. While, there-
fore, I give judgment for the company directing payment
of any moneys received by the plaintiff under such
resolution, to be set off against the moneys admittedly
due to the plaintiff, and judgment for the company for the
balance, if any, in its favour, I will stay the entry of
judgment for one month to enable the plaintiff to take
such steps as he may be advised to place the president,
Cassidey, in the same position with regard to the company
as he himself is placed in.

Judgment.
Rosa, J.

I make no order at present with respect to the costs of
this action, because I did not note what moneys the plain-
tiff had received under the resolution, or how the balance
of account will stand. The plaintiff is of course entitled
to judgment on his claim for the amount admitted or
shewn to be due, and the parties may see me with refer-
ence to that, and I will then give the formal order for
judgment.

The following authorities may be referred to : Lindley's
Law of Companies, 5th ed., p. 363 *et seq.*, especially pp.
366 and 388, and the cases there cited ; also *Re Bolt and
Iron Co.—Livingstone's Case* (1887), 14 O. R. 211 ; *Re On-
tario Express and Transportation Co.* (1894), 25 O. R. 587.

From this judgment the plaintiff appealed to the Divi-
sional Court.

On December 11th, 1899, before a Divisional Court
composed of ARMOUR, C. J., FALCONBRIDGE, and STREET,
J. J., the appeal was argued.

Shepley, Q.C., for the appellant.

Walter Barwick, Q.C., contra.

January 31st, 1900. The judgment of the Court was
delivered by

STREET, J. :—

The question to be determined in the present case is
whether the plaintiff is entitled to retain the moneys

Judgment. received by him under colour of the resolution of March,
Street, J. 1896, set out in the judgment appealed from.

Under the by-laws of the company the board of directors was composed of three persons, and the members of the board at the time of the passing of this resolution were J. J. Cassidey, who was president of the company; the plaintiff, who was secretary of the company; and one Neff, who seems to have held one share for the purpose of qualifying him as a director, but who had no real interest in the company. At the meeting at which the resolution was passed only Cassidey and the plaintiff were present, but they formed a quorum, and they passed the resolution in question with the object, as I think my brother Rose, has properly found, of appropriating to themselves all the profits which the company had earned down to that time, and of entitling themselves to receive them as they should come in and retain them to their own use. The immediate reason for the passing of the resolution was that one Nicholls, who owned the greater part of the stock, other than what was held by the plaintiff and Cassidey, had made a claim against the company which the two directors thought was unjust, and which, if sustained, would have taken at least half of the profits they estimated to have been made. In order to forestall him in this they decided to divide the profits between themselves, and thereupon \$1,000 was carried to the credit of each of them under colour of the resolution.

The real motive and object of the resolution being plainly shewn to have been that which I have stated, it is plain that moneys received under it cannot possibly be retained by either of the persons who passed it. It could not for a moment be contended that the resolution would have bound the company had its real motives and objects been set forth in a preamble to it.

The plaintiff endeavours to sustain the resolution as one within the powers of the directors as set forth in the 35th section of the Companies Act, R. S. C. ch. 119, which include the regulation by by-law of the remuneration of the

directors and the officers and servants of the company, with the further provision that the by-law so passed is only to have force until the next annual meeting of the company, and is to have no force from that time unless ratified by the shareholders.

Judgment.
Street, J.

This resolution, however, is not a by-law of the company; and, if it were to be treated as one, it was not passed for the purpose of *bond fide* fixing the remuneration of officers or servants of the company, but for an entirely different purpose. The directors were voting all the profits of the company to themselves as remuneration for past services in capacities which they had never been appointed to fill, in addition to the remuneration which they had agreed to accept as president and secretary respectively.

The remarks of the Master of the Rolls in *York and North Midland R. W. Co. v. Hudson* (1853), 16 Beav. 485 at 499-500, are strictly applicable here: "When Mr. Hudson accepted the office of chairman, he knew that the salary was not more than £1 per week, and yet he was content to give his services on that footing. * * It is the duty of every man who accepts any situation, to perform the duties of it thoroughly and entirely. If they require his whole time and attention, it is his duty to give that whole time and attention to the due discharge of them. This Court can never countenance a person who is placed in a fiduciary situation, in retaining, for his own benefit, sums of money which have come to his hands, or have been acquired by him in that character, although the acquisition of those sums is due to his own exertions, on the suggestion, that his services were worth more than what was paid for them, and that he was himself entitled to ascertain and determine the just measure of their value."

It is contended further by the plaintiff that the assent of the other shareholders to the resolution is shewn, and that it must be treated as having been ratified by them. The fact that annual statements of the affairs of the company were submitted to meetings of share-

Judgment. holders on two occasions after the passing of it, in
Street, J. which balances are shewn of being due to the plaintiff and Cassidey without explanation, and in which a lump sum is put down in the expense account for "salaries," including these sums, is the principal evidence relied on as proving assent. There is also some evidence that Mr. Cassidey, who had purchased the greater part of Nicholls' stock, had heard of some bonus having been voted by the directors. But in my opinion none of these circumstances are sufficient to shew that the shareholders in the company, other than the two directors who passed the resolution in question, with a knowledge of the circumstances gave their assent to the action of the two directors, and before the resolution can be treated as having been ratified, the proof must go to that full extent.

I think the defendants were entitled to set off the moneys received by the plaintiff under the resolution against his claim, and that the judgment is therefore right in form and substance.

The appeal should be dismissed with costs.

G. F. H.

ALLSTADT V. GORTNER ET AL.

Statute of Limitations—Moneys in Court—Payment Out by Mistake—Lapse of Time—Restitution.

Statutes of limitation have relation only between subject and subject—the Crown cannot be bound by them.

The Supreme Court of Judicature for Ontario is a public trustee as to all moneys and securities in its hands. Moneys in Court are in *custodia legis*, in this case tantamount to *custodia Regis*, and to such a fund and such a custodian the Statute of Limitations has no pertinence.

Suitors and claimants are not barred by any lapse of time in their application for payment out of moneys to which they are entitled, and reciprocally they should not be protected by lapse of time from making restitution, if they have improperly or fraudulently received moneys from the Court to which they have no just claim.

Restitution was ordered after a period of fourteen years, without interest as the mistake was that of an officer of the Court.

Where moneys in Court have been improperly paid out in an action, a motion to refund the amount is the proper procedure.

THIS was an application on behalf of the accountant of Statement. the Supreme Court of Judicature for an order directing certain parties to the suit to refund moneys paid to them out of funds in Court by the mistake of the accountant in excess of the amounts to which they were properly entitled.

The over payments were made in the years 1882 and 1885, but the mistake was not discovered until 1893. The parties over paid were notified and called upon to refund the over payment, and having refused so to do, this motion was made by the solicitor of the Court under instructions from the committee of Judges charged with the supervision of the financial affairs of the Court and was argued in the Weekly Court on October 18th, 1899, before BOYD, C.

J. Hoskin, Q. C., for the accountant.

E. Sydney Smith, Q. C., contra. A motion is not the proper procedure, an action should be brought: *Lichfield v. Baker* (1840), 13 Beav. 447. The Statute of Limitations is a bar as the evidence shews knowledge in the accountant of the mistake previous to 1893: *Brooksbank*

Argument. *v. Smith* (1836), 2 Y. & C. (Ex.) 58; Darby & Bosanquet's Statutes of Limitations, 2nd ed., 242. The moneys were paid out prior to the passing of 62 Vict., 2nd sess., ch. 11, sec. 4 (O.), and were not the property of the Crown. Interest cannot be charged: *Barber v. Clark* (1891), 20 O. R. 522; *Edwards v. Warden* (1876), 1 App. Cas. 281.

Hoskin, in reply. The funds in Court are vested in the Crown and might have to be made good: 62 Vict., 2nd sess., ch. 11, sec. 4 (O.). Time does not run against the Crown: Darby & Bosanquet, 2nd ed., pp. 24 and 516. A motion in the action is the proper mode of proceeding. [BOYD, C.:—It seems to me a motion is the proper practice and the least expensive.]

October 28th, 1899. BOYD, C.:—

Where money in custody of the Court has been improperly paid out in an action, I have no doubt of the jurisdiction (as now exercised) to follow and require a refund of the amount by way of summary application on motion or petition, and especially when the wrongful recipient is a party in the cause: *Bryan v. Mansion* (1857), 3 Jur. N. S. 473, at p. 476; and *In re Spencer* (1852), 21 L. J. N. S. (Ch.) 314; *Hogaboom v. The Receiver General of Canada* (1897), 28 S. C. R., at p. 206; *Robson v. Wride* (1867), 13 Gr. 419.

Upon the facts it is plain that an over payment has been made in this case to Wm. Gortner the defendant of \$275.75, and to the defendant Francis Gortner of \$30.98. The affidavits of the mother shew the supply of maintenance to these when infants under eighteen, and if there has been any wrongdoing in that respect alleged, it is a controversy between the sons and the mother. The fact of over payment is a mere matter of computation which cannot be varied by extrinsic evidence. The alleged discrepancy in the account rendered is sufficiently explained in the paper laid before me. The error was first discovered in the year 1893 (though the

mistakes were made in 1882 and in 1885 as to the larger sum). Attempts at settlement then made failed, and the matter appears to have remained more or less in abeyance since.

Judgment.
Boyd, C.

By statute 62 Vict., 2nd sess., ch. 11, sec. 4 (O.), all securities and moneys vested in or held by the accountant of the Court, etc., were declared to be vested in that officer in trust for Her Majesty, and this amendment of the law was thrown back to the 31st December, 1897. But before this and apart from this all the funds in Court were held and administered practically and potentially as a public trust controlled by the Court and its officers as one of the political departments of the State.

Money brought into Court or ordered to be paid into Court is for the most part held for periods of greater or less permanence under the entire dominion of the Court. It is controlled and secured and invested so as to enure to the benefit of all concerned. From the time it is paid in, until the order is made to pay out, it is managed by the officers or agents of the Court under the direction of the Judges, and this in pursuance of the public policy to that effect set forth in the various rules and enactments relating to the Court. The whole is a matter of general concern in which the Court is acting for the whole community.

Suitors and claimants are not barred by any lapse of time in their application to be paid out of moneys standing to their credit or to which they are of right entitled, and reciprocally they should not be protected by lapse of time from making restitution if they have improperly or fraudulently received moneys from the Court to which they had no just claim.

As put by Blackburn, J., in *Rustomjee v. The Queen* (1876), 1 Q. B. D., at p. 491, the Statute of Limitations has relation only to actions between subject and subject—the Crown cannot be bound by it. The same principle obtains even though the Crown have only a nominal interest and holds for others: *Regina v. Bayly* (1841), 1 D. & W. 213; 4 Ir. Eq. 142; *Attorney-General v. The Midland R. W. Co.*

Judgment. (1882), 3 O. R. 511, at p. 522; *Regina v. County of*
Boyd, C. *Wellington* (1890), 17 A. R., at p. 437, and affirmed *sub*
nomine Quirt v. The Queen (1891), 19 S. C. R. 510.

Now here the accountant or other officer holding the funds of the Court is simply the agent or officer of the Court, and the Court itself is but a public trustee as to all moneys and securities in its hands: *Warburton v. Hill* (1854), Kay 470 and 478.

In another aspect the Queen administers justice through her Judges in the Supreme Court of Ontario, and the orders of the Court are virtually and ultimately the mandates of the Crown acting for the common weal, and the moneys in Court belong to the Crown for the benefit of the public: *Colchester v. Law* (1873), L. R. 16 Eq. 253, at p. 257. In brief, all the moneys in Court are *in custodia legis*, which is in this case tantamount to *custodia Regis*. To such a fund and such a custodian, the Statute of Limitations has no pertinence: *Morst v. Joseph*, [1897] 1 Ch., at p. 224, and *The Queen v. McCann* (1868), L. R. 3 Q. B., at pp. 141 and 146, *per* Blackburn, J.

The Court will regard all the circumstances in dealing with each transaction. In the present case the mistake was that of the officer, not induced by any misrepresentation or misconduct on the part of the defendants, so that while they should make good the principal money it is not reasonable to require that it should carry interest as against them: *Barber v. Clark* (1890), 20 O. R. 522, and in Appeal (1891), 18 A. R. 435, and *Small v. Attwood* (1838), 3 Y. & C. (Ex.) 105.

I do not think, however, that the defendants should be exonerated from paying one set of costs to the official guardian occasioned by their refusal to pay anything.

NOTE.—An appeal to a Divisional Court was abandoned, and the money was paid back by the defendants.

G. A. B.

PEDLOW

V.

THE CORPORATION OF THE TOWN OF RENFREW.

Way—Highway—Dedication and Acceptance—Registered Plan—Statutory Regulations—Sale of Land by Reference to It.

Plaintiff's vendor of a lot on a plan registered by him had, prior to the sale to plaintiff, given for the purpose of extending a street the north twenty feet by the entire depth of the lot, the owner of the adjacent property also giving twenty feet for the same purpose. The latter then registered a plan shewing the street as sixty feet wide opposite the lot subsequently sold to plaintiff. This plan, although not conforming to statutory requirements, was authorized by resolution of the town council to be registered, and they accepted the street thereon forty feet in width, the figures on the plan, however, shewing the street opposite the lot in question to be sixty feet wide, but no reference was made to the former plan. Other lots were sold according to the last plan, and there was evidence of public user of and of the expenditure of public moneys on the street, and that a sidewalk had been laid down defining the width at sixty feet. The plaintiff afterwards purchased the lot mentioned according to the first plan, and moved his fence out to the original boundary of the lot:—

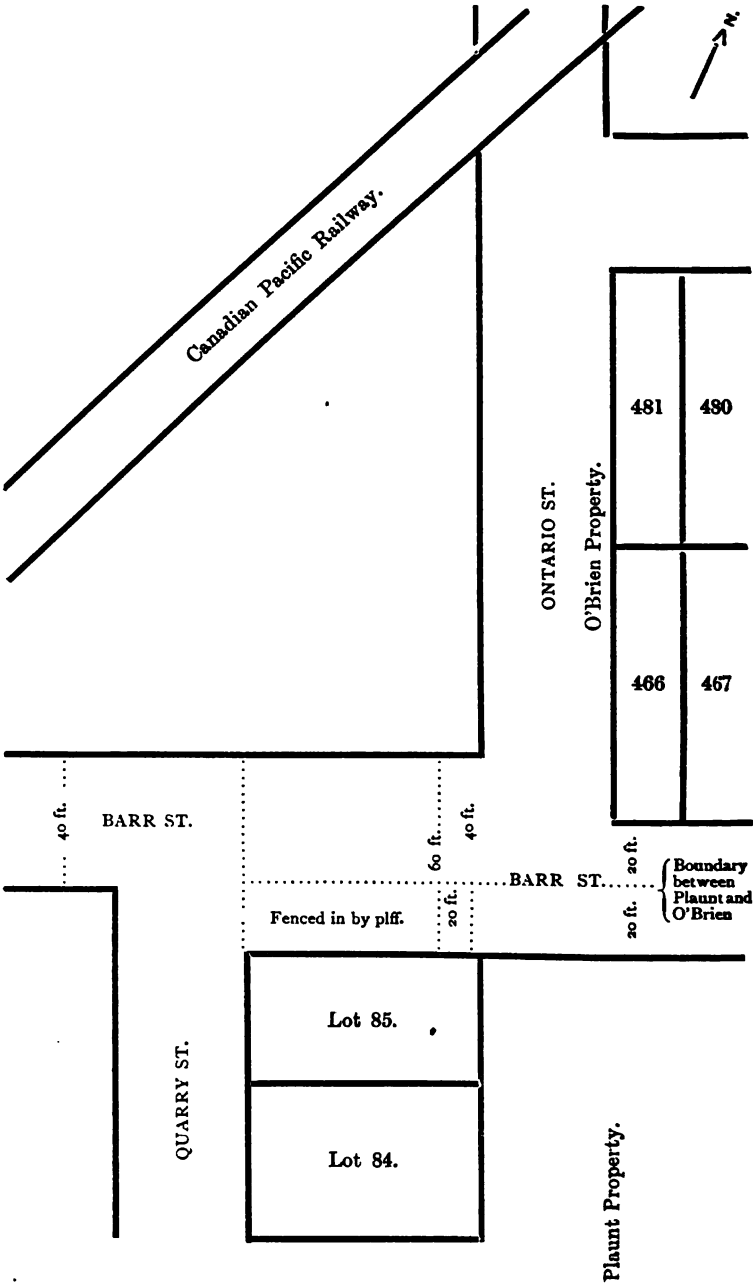
Held, that the twenty feet encroached on by the plaintiff had become part of the public highway.

THIS was an action brought to restrain the defendants Statement. from interfering with a fence erected by the plaintiff under the following circumstances.

In the year 1872, Joseph Plaunt was the owner of property in the town of Renfrew which had been subdivided on a plan duly registered in that year.

On that plan lots 84 and 85 were laid out on the east side of Quarry street; and Barr street running from the west terminated at the east side of Quarry street and in a line with the west side of the lots.

In 1894, Plaunt and Michael O'Brien, the latter of whom owned the property immediately adjoining to the north, agreed to extend Barr street to the east at a width of forty feet; each giving twenty feet of their respective properties for the purpose, and fences were erected on both sides, road work was performed on, and the public used the street as so laid out. O'Brien also in 1894, prepared a plan of lots fronting on this new street, and sold two of them according to that plan, which were built upon.



The town council on 2nd July, 1895, by resolution Statement. authorized O'Brien to register his plan and accepted the streets thereon forty feet in width, the figures on the plan however shewed Barr street to be sixty feet in width opposite lot 85, but no reference was made to the plan of the year 1872.

In 1896, the plaintiff purchased from Plaunt lot 85 according to the plan of 1872, and in 1898 moved his fence out twenty feet to the original northern boundary of lot 85, according to the 1872 plan, thereby enclosing twenty feet of Barr street as laid out by Plaunt and O'Brien. The council threatened to remove this fence, and the plaintiff thereupon brought this action for an injunction to restrain them from interfering with it.

The action was tried at Pembroke, on December 13th, 1899, before BOYD, C., without a jury.

Aylesworth, Q. C., and *T. W. McGarry*, for the plaintiff, cited *Grasett v. Carter* (1883), 10 S. C. R. 105; *Re Waldie and The Corporation of the Village of Burlington* (1886), 13 A. R., 111; *Carey v. The City of Toronto* (1885), 11 A. R. 416; *Regina v. Rankin* (1858), 16 U. C. R. 304; *Belford v. Haynes* (1850), 7 U. C. R., at p. 468; *St. Vincent v. Greenfield* (1887), 15 A. R. 567; *Dunlop v. The Township of York* (1869), 16 Gr. 216; *The Grand Hotel Co. v. Cross* (1879), 44 U. C. R., at p. 163; *Regina v. Hall* (1866), 17 C. P. 282; *Smith v. Millions* (1889), 16 A. R. 140; *Moore v. The Woodstock Woolen Mills Co.* (1899), 29 S. C. R. 627.

S. H. Blake, Q. C., and *James Craig*, for the defendants, cited *Poole v. Huskinson* (1843), 11 M. & W., at p. 830; *Pratt's Law of Highways*, 14th ed., 25; *Elliott on Roads and Streets*, 85, 115, 118, 132; *Roche v. Ryan* (1891), at pp. 111, 115, 119; *Sklitzsky v. Cranston* (1892), 22 O. R., at p. 593; *Gooderham v. The Corporation of the City of Toronto* (1890), 21 O. R. 120; (1894), 25 S. C. R. 246; *In re Morton and The Corporation of the City of St. Thomas*

Argument. (1881), 6 A. R., at p. 332; *Mallock v. Anderson* (1847), 4 U. C. R. 481; *Regina v. Boulton* (1857), 15 U. C. R. 272; *Rhea v. Forsyth* (1860), 37 Pa. St. 503; *Regina v. Gordon* (1856), 6 C. P. 213.

Aylesworth, in reply.

December 21, 1899. BOYD, C. :—

I have disposed of the disputed facts in this case but reserved consideration of some questions of law based upon statutory requirements.

Bearing in mind that a public highway may be established apart from statute, it appears to me that the evidence of dedication and acceptance is in this case conclusive against the plaintiff.

The provisions of the Registry Act and Land Surveyors Act were invoked to shew that the plan submitted to the council and registered, on which the new proposed street was figured, did not conform to statutory directions.

This nonconformity may affect the right to have the plan treated as properly registered so as to give a new basis for description of lands sold by reference to it, but it will not affect transactions (*in rem*, so to speak) which manifest the actual setting apart and acceptance of the street on the site proposed by the co-operation of the owners and the municipal authorities.

Here we have dedication by the owners and acceptance and user by the public, both concurring to create a new highway. There is no peradventure about the fact of dedication by joint pact of the coterminous proprietors. That satisfies one of the conditions forthwith unequivocally. The other involving acceptance by the public is proved ordinarily as here by public user and also by the act and resolution of the council.

The element of doubt raised is by the resolution to accept a road forty feet wide, whereas opposite the plaintiff's land the width of the way is sixty feet. But that doubt is resolved upon the evidence by which it is proved

that the town has defined one side of the street by laying down a sidewalk including the space sixty feet wide, and on the other side within forty feet of the plaintiff's land, have expended public moneys in grading and ditching streets forming the *via trita* used for over two years by the public. That certifies sufficiently that the width of the road accepted and occupied by the public was between the two fences put up by the proprietors to mark the limits of their joint dedication: *Turner v. Ringwood Highway Board* (1870), L. R. 9 Eq. 418; *Moore v. The Woodstock Woolen Mills Co.* (1899), 29 S. C. R. 627; *Cubitt v. Lady Caroline Maxse* (1873), L. R. 8 C. P., at p. 715.

Judgment.
Boyd, C.

The Municipal Act recognizes the old common law method of contributing public highways by dedication by enactments in force at the date of this transaction: see Municipal Act of 1892, 53 Vict. ch. 42, sec. 527*a* and 531 (2) (O.). There is no question arising here as to liability for repair in any particular place in the new street, but the broad question whether the plaintiff has encroached upon a public street (see *Roberts v. Hunt* (1850), 15 Q. B. 17). This issue I determine against the plaintiff, and declare that the twenty-feet encroached upon is part of a public street in Renfrew.

The costs will follow the result.

G. A. B.

THE TRUSTS & GUARANTEE CO. ET AL

V.

THE TRUSTS CORPORATION OF ONTARIO ET AL.

Limitations of Actions—Lunatic—Annuity by Will—Charge on Lands—Arrears.

A testator who died in 1872, by his will devised land to two of his sons, their heirs and assigns forever, subject to the payment of \$200 per annum for the benefit of another son (a lunatic) for his life, payable to the person who might be his guardian. Payments were made to the mother for the support of the lunatic son from 1880 to 1889, the last of which was made in February, 1889. The plaintiffs were appointed committee for the son in December, 1898 :—

Held, that the annuity was charged on, and that the right to recover out of, the land was not barred as to future payments.

Hughes v. Coles (1884), 27 Ch. D. 231, followed.

Held, also, that the payments made were discharges *pro tanto* of the annuity.

Held, also, that as the son was under disability until the plaintiffs' appointment, and as the action was brought within twenty years they were entitled to recover the annuity from February, 1890, and the annuity being an express charge on the land it might be sold to satisfy the arrears.

Statement. THIS was an action brought to enforce the payment of an annuity charged on lands under the state of facts set out in the judgment.

The action was tried at Toronto on November 14th, 1899, before MACMAHON, J., without a jury.

Claude Macdonell, and *J. T. C. Thompson*, for the plaintiffs.

Aylesworth, Q.C., and *C. A. Moss*, for the defendants.

The plaintiffs' contention was that the devise mentioned in the judgment was a trust, and the defendants, that it was an annuity and was consequently barred by the Statute of Limitations, and that no payment had been made which would prevent the statute running. The following references were made and cases cited: The Devolution of Estates Act, R.S.O. ch. 127, sec. 4; 54 Vict. ch. 18 (O.); 56 Vict. ch. 20 (O.); 60 Vict. ch. 15, sec. 3 (O.); *In re Ferguson* (1891), 11 C. L. T. Occ. N. 201; *In re Baird* (1893), 13 C. L. T. Occ.

N. 277; *In re Martin* (1895), 26 O. R. 465; *Martin v. Magee* (1891), 18 A. R. 384, *per* Osler, J. A., at pp. 388, 389; *Armour on Titles*, 2nd ed., pp. 295, 296; *Gandy v. Gandy* (1885), 30 Ch. D. 57; *Faulkner v. Faulkner* (1892), 23 O. R. 252; *Hughes v. Coles* (1884), 27 Ch. D. 231; *Darby & Bosanquet's Statutes of Limitations*, 2nd ed., 429; *Owen v. De Beauvoir* (1847), 16 M. & W. 547; *De Beauvoir v. Owen* (1850), 5 Ex. 166; *Jones v. Withers* (1896), 74 L. T. N. S. 572; *The Incorporated Society v. Richards*, (1841), 1 Dr. & W., at p. 289; *James v. Salter* (1837), 3 Bing. N. C. 544; *Grant v. Ellis* (1841), 9 M. & W. 113; *Bullen & Leake*, 5th ed., 776; *Burrell v. The Earl of Egremont* (1843), 7 Beav. 205; *The Stamford Spalding, etc., Co. v. Smith*, [1892] 1 Q. B. 765; R. S. O. ch. 133, sec. 2, sub-sec. 3, secs. 4, 23 and 24.

February 14, 1900. MACMAHON, J.:—

The plaintiffs are the committee of Thomas Anson Grange, a lunatic, and the defendants, The Trusts Corporation of Ontario, are the administrators of the estate of William Grange, deceased. The defendant Hugh Scott Grange is a merchant at Napanee. And the defendants Florence Grange and Eveline Grange are the infant children of William Grange and Margaret Jane Grange.

Thomas Grange of Napanee, by his last will and testament, dated the 1st of August, 1872, made the following devise in favour of his sons William Grange (since deceased) and Hugh Scott Grange: "I give and bequeath to my two sons William and Hugh Scott those parts of lots numbers six and seven on the north side of Dundas street in the town of Napanee in the county of Lennox and Addington aforesaid, now owned by me; to have and to hold the same to and to the use of them, my said two sons their heirs and assigns forever, to be divided between them at the time and in the proportions hereinafter mentioned; subject, however, to the payment by my said two sons of the sum of two hundred dollars per annum for the

Judgment. benefit of my son Thomas Anson Grange, which said sum
MacMahon, or annuity, or so much thereof as shall be reasonably
J. necessary for the support and maintenance of my said son
Thomas Anson, shall be paid yearly and every year, for
and during the natural life of my said son Thomas Anson,
to the person or persons who may be his guardian or
guardians."

The proportions in which they were to take was two-thirds to William and one-third to Hugh Scott.

Thomas Grange died on the 13th of September, 1872, and probate was granted to William Grange his son, and Margaret Elizabeth Grange his wife, the executor and executrix named in the will.

William Grange was a member of a co-partnership carrying on business at Napanee, under the style of Grange & Brothers, who becoming embarrassed, they, on demand by certain of their creditors, on the 9th of November, 1877, made an assignment for the general benefit of their creditors, under the Insolvent Act of 1875, to William F. Hall, an official assignee for Lennox and Addington; who, on the 26th of October, 1878, in consideration of \$1,500, sold and conveyed all the title and interest of the said insolvents as co-partners and as individuals in and to the parts of lots six and seven on the north side of Dundas street in Napanee (being all the interest of William Grange devised to him by the will of Thomas Grange), to Arabella Grange, wife of Alexander W. Grange, and Margaret Jane Grange, wife of the said William Grange.

Arabella Grange, on the 7th of December, 1878, conveyed all her interest in the said lands to Margaret Jane Grange.

On the 20th of May, 1881, William Grange was granted a discharge under the Insolvent Act of 1875 by the Judge of the County Court of Lennox and Addington.

Hugh Scott Grange being indebted to various persons and firms in about \$3,500, he, on the 1st of September, 1886, in consideration of William Grange assuming and agreeing to pay the same, conveyed his undivided one-

third interest in said lots six and seven (together with other lands) to said William Grange. And on the same day William Grange executed his bond to Hugh Scott Grange, conditioned for the reconveyance to him of the said lands, on repayment to William Grange of the amount of all advances made by him in payment of such debts and the interest thereon. This made William Grange mortgagee in possession of Hugh's one-third interest.

Judgment.
MacMahon,
J.

By indenture of mortgage dated 30th of August, 1888, William Grange and Margaret Jane Grange his wife, mortgaged to the Canada Permanent Loan & Savings Company the said parts of lots six and seven to secure the sum of \$3,200. And by assignment, dated November 1st, 1888, which was duly registered, William Grange assigned and conveyed to the Canada Permanent Loan & Savings Company all the interest of Hugh Scott Grange which William Grange had obtained from the latter, subject, however, to redemption by Hugh Scott Grange in accordance with the bond previously referred to.

Margaret Jane Grange died on the 8th of July, 1889, intestate, and leaving her surviving, her husband and five children, all of whom were infants. One child (an infant), died in 1889, within two months of the death of its mother. On the 22nd of February, 1894, a daughter Ethel Augusta, died at the age of seventeen years, unmarried. So that the interest of these two children became vested in their father and brother and two sisters. The father, William Grange, died on the 13th of January, 1895, having by his will dated the 11th of November, 1889, devised two undivided one-fifth parts of the real estate of which he might die possessed, to his son Thomas Alexander, and to his daughters share and share alike.

Thomas Alexander died on the 24th of May, 1897, unmarried and intestate, leaving his two sisters the infant defendants.

On the 26th of August, 1895, the Canada Permanent Loan & Savings Company assigned to the defendants the Trust Corporation of Ontario, the mortgage heretofore

Judgment. referred to, and all their rights under the assignment of
MaeMahon, J. November 1st, 1888, from William Grange to the said Loan Company.

On the 19th of December, 1898, the plaintiffs The Trusts & Guarantee Company were duly appointed the committee of the estate of the said Thomas Anson Grange, who since his father's death (at which time he was over twenty-one years old), has lived with and been maintained by his mother, Margaret Elizabeth Grange, who between the years 1880 and 1889, received from Stephen Gibson, the agent of the Grange property, out of which the annuity is payable on account of Thomas Anson Grange, the sum of \$400. The last payment, a sum of \$50, being made on the 9th of February, 1889.

After such payments were made, Gibson during each year up to and inclusive of the year 1885, obtained the confirmation in writing of Hugh Scott Grange, William Grange, and Margaret Jane Grange. The payment made in 1881, was confirmed in writing by William and Margaret Jane Grange. From 1887 to 1889 inclusive, there was no confirmation but Mr. Gibson stated that he settled the accounts with William Grange, who acted for his wife.

However, the rights of Anson in regard to the annuity are not, according to my view, affected by the statute of limitations, except as to the arrears thereof (a matter with which I will deal hereafter), and this I consider is put beyond question by *Hughes v. Coles* (1884), 27 Ch. D. 231, cited by Mr. Aylesworth.

In *Hughes v. Coles*, the annuity was charged on the land and payable out of the rents and profits thereof. In the present case the land is charged with the annuity, for William and Hugh Scott Grange take subject to the payment of the annuity, but nothing is said about its being paid out of rents or profits. However, as pointed out by North, J., in *Hambro v. Hambro*, [1894] 2 Ch., at p. 572, an estate may be "charged with annuities—annuities which very likely were rent charges, but were not the less annuities."

In *Hughes v. Coles*, by a deed executed in 1833, certain real estate was conveyed to trustees upon trust to pay an annuity out of the rents and profits thereof, to J. Morgan, his heirs and assigns for ever. The right to receive the annuity first accrued in 1857, and the annuitant first made a claim in 1884.

Judgment.
MacMahon,
J.

Kay, J., in delivering judgment said : "The question is as to the effect in that state of things of the recent Statute of Limitations, 37 & 38 Vict. ch. 57, sec. 10. It is obvious that the terms of the section do not destroy the right to recover any future payments of the annuity. 'Any sum of money' may apply to each instalment of the annuity as it becomes due, as was said in *Edwards v. Warden* (1874), L.R. 9 Ch. 505, so that the right to recover any one payment of the annuity is the same under that section as if there were no trust, but the right to future payments has not yet arisen at all, and consequently the section does not apply to such future payments. This was admitted in the argument, and the real question is, what is the effect of the section upon the payments which had become due before the present application was made? By section 9, the Act is to be construed together with the Act 3 & 4, Wm. IV. ch. 27, sec. 1; the interpretation clause of that Act provides that the word 'rent' shall extend to all annuities charged upon or payable out of any land; and section 42 provides that no arrears of rent shall be recovered but within six years, and if the annuity be, as it is admitted, an existing charge, six years' arrears would be recoverable under that section. But by section 1 of the Act of 1874, no proceeding to recover any rent, that is, any annuity charged upon land, can be taken after twelve years from the time when the right first accrued; therefore, if there were not any trust, those twelve years having elapsed, none of the past instalments of the annuity could now be recovered. That is precisely what section 10 of the Act of 1874 says must now happen; and accordingly it seems to me that the result is that no payment of the annuity which became due before this application was made in

Judgment. June, 1884, can now be recovered, because as to any such sum the remedy is only the same as if there were not any trust, in which case it would be irrecoverable.”

**MacMahon,
J.**

Sections 1, and 10 of the Imperial Act, 37 & 38 Vict. ch 57, are respectively embodied in sections 4 and 24 of our Act, R. S. O. ch. 133. And the interpretation clause of 3 & 4 Wm. IV. ch. 27, sec. 1, in so far as the meaning of the word “rent” is concerned is followed in the interpretation clause of our Act, ch. 133, sec. 1, subsec. 3, which provides that: “‘Rent’ shall extend to all annuities and periodical sums of money charged upon or payable out of any land.” While sections 17 and 18 of our Act together form a transcript of section 42 of the Imperial Act.

Margaret Jane Grange in the conveyance to her from the assignee of her husband's estate, took the land subject to the charge created by Thomas Grange's will in favour of Anson. And William Grange when he accepted the deed from his brother Hugh took subject to the charge on Hugh's interest. And when William Grange and his wife Margaret Jane Grange mortgaged this land to the Canada Permanent Loan and Savings Company, the mortgagees took subject to the annuity charge, as likewise did the defendants the Trusts Corporation when they accepted the assignment from the Canada Permanent Loan & Savings Company.

This brings me to a consideration of the question strenuously urged that the action was barred by the Statute of Limitations.

The action could not as to the future payments of the annuity out of the land be barred by the statute: *Hughes v. Coles* (1884), 27 Ch. D. 231. And there is no personal claim made against the defendants or any of them. The mother of Anson was his natural guardian, and so long as he remained with, and was supported by her, and payments were made to her on account of such maintenance, such payments were discharges at least *pro tanto* of the amount of the annuity.

Anson has always been under disability by reason of his being a lunatic, and before his right to recover the annuity could be enforced, it was necessary that a legal guardian be appointed, which was done by the appointment of the plaintiff company as committee on the 19th of December, 1898.

Judgment.

MacMahon,
J.

Assuming that Anson's mother accepted as being sufficient for his maintenance the amounts received by her between 1880 and 1889, and that thereby the annuity was satisfied up to the latter year, another payment would not be due until February, 1890; and as by section 44 of the Limitations Act, twenty years are allowed within which to bring the action, in case of a disability such as Anson was under, the plaintiffs as his guardian and committee are entitled to recover an annuity "reasonably necessary for his support and maintenance" not to exceed \$200, from February, 1890, out of the lands mentioned. And there will be judgment accordingly, with a reference to the Master at Napanee (if the parties cannot agree on a sum) as to the amount necessary for such support.

The annuity being an express charge upon the land, the plaintiffs are entitled to have the property sold to satisfy the arrears of the annuity: *In re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323.

The consent of the National Trusts Company, Limited, to be added as administrators *ad litem* to the estate of Margaret Jane Grange was put in after the trial.

The costs of the plaintiffs may be added to their claim to be paid out of the estate.

G. A. B.

SILLS

V.

THE CORPORATION OF THE COUNTY OF LENNOX AND
ADDINGTON.

*Municipal Corporations—Administration of Justice—Detection of Crime—
Constable's Services and Expenses—Payment for—Certified Account—
R. S. O. ch. 101, sec. 12.*

The gist of section 12 of R. S. O. ch. 101, is to empower a Warden and County Attorney to authorize any constable or other person to perform special services not covered by the ordinary tariff, which are in their opinion necessary for the detection of crime or the capture of persons believed to have committed serious crimes, and to do so upon the credit of the county, and so to render the county liable for the payment for such special services, and that whether the account is certified by the Warden and County Attorney as required by the said section or not.

Statement. THIS was an action brought by E. H. Silles, the high constable of the county of Lennox and Addington, against the corporation of that county for services rendered and expenses incurred in collecting evidence, etc., in respect of a criminal charge, which were so rendered and incurred under the instructions of the Warden and acting County Crown Attorney, as set out in the judgment.

The action was tried at Napanee on November 29, 1899, before ARMOUR, C. J., without a jury.

*Aylesworth, Q.C., and Deroche, Q.C., for the plaintiff.
W. G. Wilson, for the defendants.*

January 16, 1900. ARMOUR, C.J. :—

By sec. 12 (1) of Revised Statutes of Ontario ch. 101, it is provided that:

"In any case in which in the opinion of the Warden and Crown Attorney of a county, special services not covered by the ordinary tariff are necessary for the detection of crime or the capture of persons who are believed to have committed crimes of a serious character, the Warden and County Attorney aforesaid may authorize

any constable or other person, to perform these services ^{Judgment.} and shall certify upon the account to be rendered by the ^{Armour, C.J.} constable or other person what they deem a reasonable allowance to be paid to the person employed, and the amount so certified shall be allowed to such person in the accounts in respect of the administration of justice, and shall be paid in the first instance by the county, and one-half thereof shall be repaid to the county by the Province."

The origin of this legislation is to be found 48 Vict. ch. 18 (O.).

On the 23rd of July, 1898, the Warden of the united counties of Lennox and Addington, one James Bryden, and the acting County Crown Attorney for the said counties, one W. S. Herrington, signed and delivered to the plaintiff the following writing:—

"Under the provisions of sec. 12 of ch. 101 of the Revised Statutes of Ontario, we hereby request you, acting under instructions from the County Crown Attorney, to lend all assistance in your power to collect evidence bearing upon the Dominion bank robbery."

The plaintiff thereupon went on and performed services and incurred expenses to the amount of \$421.40 in pursuance of said request and acting under instructions from the said County Crown Attorney.

The plaintiff during the course of his employment received the sum of \$100 on account of such services and expenses under the provisions of sub-sec. 3 of said sec. 12, and after the termination of his employment the plaintiff rendered to the County Crown Attorney his account for such services and expenses.

This account had not upon it when it went before the board of audit a certificate by the Warden and County Attorney of what they deemed a reasonable allowance to be paid to the plaintiff, but only a certificate to that effect by the County Attorney.

The Warden who signed the request had gone out of office before the account was rendered, and another Warden had been chosen, and although a certificate required by sec-

Judgment. tion 12 (1) never was tendered to him for his signature, yet, from the conversations had by the County Attorney with him in January, 1899, it was abundantly evident that he would not have signed such a certificate had it been tendered to him for signature, and his testimony at the trial showed also that he would not have done so.

Armour, C. J.

The board of audit rejected the account, no doubt, because it had not upon it the certificate required by section 12 (1), and after some negotiations for a settlement between the plaintiff and the defendants which fell through, this action was brought to recover the balance of account after the payment of the said sum of \$100, namely, \$321.40.

I find that the services and expenses charged for by the plaintiff in his said account were all performed and incurred by him and were necessary for the detection of crime; and that the amount of the account rendered by the plaintiff was a reasonable allowance to be paid to the plaintiff for such services and expenses.

The question, however, is whether, admitting all this, an action will lie by the plaintiff against the defendants for the amount of his account without the certificate required by section 12 and without the same being allowed the plaintiff in the accounts in respect of the administration of justice, and I have come to the conclusion that it will.

The effect of section 12 is, in my opinion, to authorize the Warden and County Attorney to authorize any constable or other person to perform special services not covered by the ordinary tariff, which are in their opinion necessary for the detection of crime or the capture of persons who are believed to have committed serious crimes; and to do so upon the credit of the county and to so render the county liable for the payment for such special services.

And I do not think that the constable or other person is at all concerned whether the Warden or County Attorney shall certify as required by the said section or not.

The only object of that certificate being, in my opinion, to enable the county to be repaid by the province one-half of the amount so certified.

The section casts upon the Warden and County Attorney ^{Judgment.} the duty of certifying as required by the section, and does ^{Armour, C.J.} not impose upon the constable or other person the duty of procuring such certificate.

It is quite clear that if such account comes before the board of audit, certified as required by that section, the board of audit have no recourse but to allow it; they cannot increase, reduce or interfere with it in any way. "Whenever the language of the Legislature admits of two constructions, and if construed in one way would lead to obvious injustice, the courts act upon the view that such a result could not have been intended, unless the intention has been manifested in express words": Maxwell's Interpretation of Statutes, 3rd ed., p. 277.

To construe the section in question so as to preclude the constable or other person from recovering for his services unless the Warden and County Attorney first certified as required by that section and the board of audit allowed them would lead to obvious injustice.

It would enable either the Warden or County Attorney or both to prevent the constable or other person ever being paid for his services or ever being paid an adequate amount for them.

If both should refuse to certify each might be compelled by mandamus to certify, but to certify what? Not any particular amount, but what he should deem reasonable, and if each certify a different amount, what then? How could the board of audit act at all in such a case? The section plainly required a joint certificate of the same amount.

If both should unite in certifying an amount, but one wholly inadequate, what then? Would the constable or other person be obliged to be content with it? I cite these instances which might occur to shew the injustice that might arise from the section being construed differently from the way in which I have construed it.

According to the construction contended for by the defendants, the plaintiff would, before he could get paid for

Judgment. his services, be obliged to procure both the Warden and Armour, C.J. County Attorney to give the required certificate.

The County Attorney has certified for the full amount but it is quite clear that the Warden will not do so, and without his doing so the plaintiff, it is contended, cannot get payment for his services.

It is contended that the plaintiff ought to have proceeded against the Warden by mandamus, but, as I have shewn, this remedy would not compel him to certify to the amount the County Attorney has certified for, and if he certified for less it would avail nothing.

Such a course would be simply trifling with justice. In my opinion this action is maintainable, and the plaintiff ought to recover the sum of \$321.40, with High Court costs.

G. A. B.

PARNELL ET AL. V. DEAN ET AL.

*Covenant—Restraint of Trade—"Engage in the Business"—Breach
Action—Parties.*

A covenant not to engage or be interested directly or indirectly either by himself, or with, by, or through any other person or persons whomsoever, either as principal or agent or otherwise howsoever, in the business of a baker within a fixed radius for a certain time is broken by the covenantor assisting the owners of a similar business without remuneration.

One of several joint covenantees, in a covenant in restraint of trade or an incorporated company to whom the interests of the covenantees in the business has been transferred, may, if interested in the good will, maintain an action for an injunction against the covenantor for breach of the covenant, notwithstanding that the other covenantees have ceased to be interested in the business.

THIS was an action brought by Edward Parnell and the Parnell-Dean Steam Baking Company Limited, against Charles Frederick Dean, George Franklin Dean and Robert Dean, under the circumstances set out in the judgment and was tried at London on December 6th, 1899, before ARMOUR, C. J., and a jury. Statement.

Talbot Macbeth, for the plaintiffs.

I. F. Hellmuth, *A. Casey*, and *J. H. A. Beattie*, for the defendants.

It was contended at the trial that as Charles Frederick Dean's covenant was only "with the parties of the second and third parts" to the agreement, who were George Franklin Dean, Robert Dean, and Edward Parnell, and that it being thus only a joint covenant, and not being extended to their assigns neither Edward Parnell nor the Parnell-Dean Steam Baking Company either alone or together could maintain the action as constituted.

January 19, 1900. ARMOUR, C. J.:—

Prior to the 21st of April, 1898, the defendants were carrying on business in the city of London in co-partnership as bakers and it was then agreed that the defendant Charles F. Dean should retire from the business and that

Judgment. the other defendants should combine the business with **Armour, C.J.** that of the plaintiff Parnell, another baker carrying on business in the city of London, and by agreement of that date made between the said Charles Frederick Dean of the first part, George Franklin Dean and Robert Dean of the second part, and the plaintiff Edward Parnell the younger of the third part, reciting that by indenture bearing even date therewith the party of the first part had for the consideration of two thousand dollars therein mentioned, granted to the said parties of the second part, his undivided one-half interest in part of lot number fourteen on the north side of Albert street in the said city of London and more particularly described in the said conveyance. And reciting that upon the negotiations for the said purchase it was stipulated by the said parties of the second part that the said party of the first part should bind himself not to engage in the business of a baker in the city of London, or within a radius of ten miles therefrom during the next ten years. And also reciting that the parties thereto of the second and third parts were about to enter into business together in the said city of London as bakers and confectioners.

In consideration of the premises and of the said sum of two thousand dollars then paid by the said parties of the second part to the said party of the first part, the said party of the first part did thereby covenant with the parties of the second and third parts, that he, the said party of the first part, would not directly or indirectly, either by himself, or with, by, or through, any other person or persons whomsoever, either as principal or agent, or otherwise howsoever, engage, or be interested in, or allow his name to appear in the business of a baker in the said city of London or within a radius of ten miles therefrom, for the space of ten years from that date, and in case of the breach of the therein foregoing covenant in any particular, the parties thereto agreed that the sum of fifty dollars per month for each month during which the breach continued should be recoverable as liquidated damages.

On the same day an agreement was entered into Judgment. between the plaintiff and the defendants other than Armour, C.J. Charles F. Dean to combine their businesses and to form a joint stock company to be called the Parnell-Dean Steam Baking Company, Limited, with a capital of \$15,000 to be divided into fifteen hundred shares of ten dollars each, and it was agreed that each party should transfer to the said company the plant, stock-in-trade, book debts, and good will of his and their business, receiving therefor stock in the said company at an agreed value.

And on the 5th of May, 1898, letters patent incorporating the said company were obtained and the said plant, stock-in-trade, book debts, and good will, were transferred to the said company, and stock in the said company for the agreed value thereof was allotted to the respective parties.

Afterwards the defendants, other than Charles F. Dean, sold their stock in the said company and retired from the business.

And afterwards, two other brothers of the defendants, viz, James Dean and Albert Dean, formed a co-partnership under the name of Dean & Co. for carrying on the business of bakers in the city of London, and the defendant Charles Frederick Dean, began to assist them in the business, baking bread and distributing it—but, as he said, simply as a volunteer.

I am of the opinion, however, that his doing so was as much a breach of his covenant as if he had done so for hire.

His doing so was, in my opinion, engaging in the business of a baker in the said city of London, and was a breach of his covenant: *Rolfe v. Rolfe* (1846), 15 Sim. 88; *Newling v. Dobell* (1869), 38 L. J. Chy. 111; *Baxter v. Lewis* (1886), 30 Sol. J. 705; *Jones v. Heavens* (1877), 4 Ch. D. 636; *Hill & Co. v. Hill* (1886), 55 L. T. N. S. 769.

I think it clear upon the authorities that the plaintiff Parnell could have alone maintained the action for the injunction, and that the plaintiffs the Parnell-Dean Steam Baking Company, Limited, could have alone main-

Judgment. tained the action for the injunction, for each plaintiff was
Armour, C.J. interested in the good will of the business formerly carried on by the defendants as co-partners, and thus interested in the observance by the said Charles F. Dean of his covenant, and certainly this action is maintainable as the suit is constituted: *Jacoby v. Whitmore* (1883), 49 L. T. N. S. 335; *Palmer v. Mallet* (1887), 36 Ch. D. 411; *Cullen v. Knowles*, [1898] 2 Q. B. 380; *Leather Cloth Co. v. Lonsont* (1869), L. R. 9 Eq. 345; *McCausland v. Hill* (1896), 23 A. R. 738.

And it is no answer to the relief sought for, that the defendants other than Charles F. Dean, have ceased to carry on business: *Hitchcock v. Coker* (1837), 6 A. & E. 438; *Hastings v. Whitley* (1848), 2 Exch. 611.

The plaintiffs are therefore entitled to an absolute injunction and the defendant Charles Frederick Dean, must pay their costs as well as the costs of his co-defendants: *Rudow v. Great Britain Mutual Life Ass. Society* (1881), 17 Ch. D. 600.

G. A. B.

KELLY V. DAVIDSON.

Master and Servant—Foreman—Negligence—Evidence.

A plant forming part of the scaffold being used in the erection of a house had been securely placed in position under instructions of the contractors' general superintendent. Late one afternoon two workmen of their own accord removed the stay on which one end of the plank had rested, and replaced it about a foot higher in an insecure fashion. Early the following morning, to carry out instructions of the foreman, the plank was replaced on the stay by fellow workmen in the presence of the plaintiff, and when the plaintiff was mounting on it the stay gave way, and he fell and was injured :—

Held, that there was no evidence of negligence on the part of the foreman.

THIS was an action of negligence brought by an employee Statement. against certain contractors under the circumstances set out in the judgment.

The action was tried before MACMAHON, J., and a jury, at Toronto, on January 30th and 31st, 1900, and argued on February 12th, 1900.

H. E. Irwin, and *S. B. Harris*, for the plaintiff, referred to *Perkins v. Dangerfield* (1879), 51 L. T. N. S. 535; *Caldwell v. Mills* (1893), 24 O. R. 462.

Clute, Q. C., and *A. R. Clute*, for the defendant, referred to *Griffiths v. The London and St. Katharine Docks Co.* (1884), 13 Q. B. D. 259; *Weblin v. Ballard* (1886), 17 Q. B. D. 122; *Thomas v. Quartermaine* (1887), 18 Q. B. D. 685; *Wilson v. Merry* (1868), L. R. 1 Sc. App. 326; *Forward v. City of Toronto* (1888), 15 O. R. 370; *Black v. Ontario Wheel Co.* (1890), 19 O. R. 578; *Crafter v. Metropolitan R. W. Co.* (1866), L. R. 1 C. P. 300; *Walsh v. Whiteley* (1888), 21 Q. B. D. 371; *Smith on Negligence*, 2nd ed., pp. 45, 68; *Holmsted's Workmen's Compensation for Injuries Act*, p. 35.

February 19th, 1900. MACMAHON, J. :—

Action to recover damages for injuries sustained on September 8th, 1899, by the plaintiff, a carpenter, while

Judgment.
MacMahon,
J.

employed by the defendants, who are contractors, in the erection of a building in Toronto, such injuries being caused by his being precipitated a distance of thirty feet to the ground by the giving way of part of the scaffolding on which he was working, which it is alleged was negligently and improperly constructed.

The scaffold upon which the plaintiff was standing consisted of a single plank, fourteen or sixteen feet long, one end of which rested on a trestle and the other on a stay formed of a plank nailed to two upright posts forming a part of the main structure of the building. The stay as originally fastened to the posts was perfectly secure, as the plank forming the stay was two inches thick and rested on its edge on a cleat securely fastened to the posts by spikes, the stay itself being also securely fastened to the posts by large spikes. The whole evidence, including that of the plaintiff, shewed that the stay, while in that condition, was capable of sustaining a great weight. And Walter Davidson, the general superintendent of the defendants' works, was explicit in giving directions to the workmen from time to time, that the stays should be put up and secured as these stays were.

The stay in question was removed by William Collins, and John Deacon, two workmen, for their own convenience while working a windlass, about three o'clock on the afternoon of the 7th, and raised about a foot above the cleats and nailed to the posts in a manner which rendered the stay dangerous, as it was fastened at the end put up by Collins with two or three nails and at the end put up by Deacon (the end upon which the plank forming the scaffold was placed), by only one nail. On the following morning between eight and nine o'clock, Collins and the plaintiff were directed by James Kelly, the foreman on this work, to cut off the ends of two beams at the top of the third story, and the plank referred to was thrown across from the trestle to the stay, a distance of twelve feet. The plaintiff and Collins mounted this plank, which was over an open hatchway, when the stay gave way, and the

plaintiff fell down through the hatchway and so received the injury for which the action is brought.

Judgment.
MacMahon,
J.

The following are the questions submitted to the jury with their answers thereto :

"1st. Did Davidson's foreman direct Collins and Deacon to remove the stay on September 7th ? No.

"2nd. If such direction was not given did the replacing of the stay by Collins and Deacon cause it to be defective ? Yes.

"3rd. If the stay was defective was the defect not discovered owing to the negligence of Davidson or of the foreman James Kelly ? Yes. Because not discovered through the negligence of the foreman.

"4th. Who placed the plank across between the two beams to form the scaffold ? Foreman Kelly.

"5th. Was the person who so placed the plank aware that the stay was defective ? No. Through his own negligence.

"6th. If it should be held that the plaintiff is entitled to recover, at what do you assess the damages ? \$500."

The jury having found that James Kelly, the foreman, did not direct Collins and Deacon to remove the stay, as sworn to by them, there is not, in my opinion, any evidence to support the finding of the jury that the defect was not discovered through the negligence of the foreman. The stay being removed about three o'clock, and as the workmen left at five o'clock, there would be only two hours in the afternoon of the 7th, and an hour and a half on the morning of the 8th, or three hours and a half altogether, during which the stay was defective,—a stay which until being displaced by Collins and Deacon, was as secure as the workmen could make it. The last thing a foreman of works would think of would be that workmen would undertake to displace that upon which so much trouble had been taken in making it secure, and in respect to which so many warnings had been given by Walter Davidson, the superintendent, as to the necessity for the stays being made thoroughly secure. And no foreman

Judgment. could anticipate that there would be such a breach of duty by workmen under him as that of which Collins's and Deacon were guilty in removing the stay ; and it is only on the assumption that such breach of duty should have been anticipated that the increased vigilance in discovering defects would be cast upon him, which the answer to the third question would clearly imply. James Kelly, the foreman, had no reason to suppose any change had been made in the stay, because, according to Collins' evidence he (Kelly), after the plank had been placed in position, said to Collins and the plaintiff it would carry a ton in addition to their own weight. Even then Collins did not notify the foreman that the stay had been removed from its original position, nor did he give any warning to the plaintiff that it was insecure and the scaffolding therefore dangerous.

MacMahon,
J.

After the jury returned with their answers to the questions, I inquired from them what was the negligence imputed to the foreman in their answer to the third question. They replied "The plank would be higher at one end than the other and he could easily see facing that."

The foreman having a right to assume that the stay had not been tampered with by the workmen, and that it was in the condition of security in which it was placed under his directions, and when it was in the same condition up to three o'clock the previous day, there was nothing in the mere difference in the height of the two ends of the plank to indicate that there had been a change. The difference caused no comment on the part of the plaintiff who was present and saw the plank placed in position, and who mounted on it to commence work.

If it could be held there was negligence on the part of a foreman upon the facts disclosed here, it would cast a responsibility on employers never contemplated by the Act.

Effect must be given to the motion made by defendant's counsel at the conclusion of the trial that there was no

evidence of negligence on the part of James Kelly, the foreman, in not discovering that the stay was defective. There will, therefore, be judgment for the defendants dismissing the action with costs.

Judgment.
MacMahon,
J.

A. H. F. L.

BOARDMAN V. NORTH WATERLOO INSURANCE COMPANY.

Fire Insurance—Statutory Condition 3—“Change Material to Risk”—Non-occupancy.

The fact that a dwelling house is unoccupied is not *per se* a “change material to the risk,” within statutory condition 3 in a fire policy on household furniture therein.

SPAHR V. NORTH WATERLOO INSURANCE COMPANY.

Fire Insurance—Statutory Conditions—Variation of Condition Requiring Occupation of Premises—“Untenanted.”

A variation of statutory condition 3 in a policy of fire insurance providing that “if the premises insured become untenanted or vacant and so remain for more than ten days without notifying the company,” etc., “the policy will be void,” is a reasonable condition, and the word “untenanted” therein must be read as synonymous with “unoccupied.”

Where, therefore, the occupant of a house ceased to reside in it for several weeks, but left furniture and clothing therein, while a person went there for domestic purposes, and on two occasions the insured’s husband slept in the house, it was held that the house was untenanted and vacant within the meaning of the condition.

THESE were actions tried before BOYD, C., without a jury, at Berlin, on November 5th, 1899. *Statement.*

The same counsel appeared in each :—

Maybee, Q.C., for the plaintiff.

E. F. B. Johnston, Q. C., and W. M. Reid, for the defendants.

Statement. The only question in each case was whether the premises were unoccupied within the meaning of a condition of the policies.

The facts, so far as material, are set out in the judgments.

The learned Chancellor reserved his decision.

The judgment in the *Boardman* case was as follows :—

December 28, 1899. BOYD, C. :—

Mrs. Boardman was insured in respect of household furniture in a dwelling house of which her husband was tenant. She, being about to be confined, moved with her husband to her adopted mother's house, a short distance away in the same village, and had not again occupied the house before it was burned. The only clause in the policy which would apply to the situation is the third statutory condition to the effect that any "change material to the risk," etc., shall avoid the policy.

It is well settled that such a change as this of vacating the house in which goods may be, is not *per se* an increase of risk. That is very fully and ably discussed by Carter, C. J., in *Foy v. Aetna Ins. Co.* (1854), 8 N. B. R. (O. S. 3 Allen) 29; and the same doctrine is affirmed by our own Courts.

In *Gould v. British America Ins. Co.* (1868), 27 U. C. R. 473, 480, Hagarty, J., said, if the underwriters desire to make continued residence a condition precedent to the right of recovery in the case of a building described as a dwelling house occupied by a tenant, we think they must use express language to meet the case.

There is no evidence that Mrs. Boardman knew of the house being insured in which the goods were, and as to the goods themselves in the house, I do not think the circumstances of this case exempt the defendants.

As against the plaintiff, I do not find that the risk was increased and judgment should go for the amount of \$300 and full costs.

The judgment in the *Spahr* case was as follows:—

Judgment.

Boyd, C.

December 28, 1899. BOYD, C.:—

The dwelling house mentioned in the Boardman case belonged to this plaintiff and was insured by her in the same company. Her policy contained a clause in variation of statutory clause 3 to this effect "if the premises insured become untenanted or vacant and so remain for more than ten days without notifying the company, etc., the policy will be void."

As stated in the Boardman case the tenant moved from the premises insured and went to the plaintiff's house, leaving furniture and clothes behind, and the house was without an occupant for four or five weeks before the fire, which occurred on the night of the 17th November. The house was not abandoned or neglected during the interval, some one went there to feed pigs and chickens and water flowers in the house, to do washing, and it was also in use for the killing of pigs, and the husband slept in it twice in the interval.

The case turns on the meaning to be given to the usual phrase used in the policy "if the premises become untenanted or vacant." The usual word in this connection is "unoccupied."

I have come to the conclusion that this is a synonymous word in its usual acceptance and as found in these conditions. The dictionaries are in accord.

In the Imperial Dictionary "untenanted" is defined as "not occupied by a tenant; not inhabited." Precisely the same definition in the same words is given in the Century Dictionary.

No doubt technically a tenant need not be an occupant, but the language of insurance contracts is to be construed rather with regard to the fair colloquial meaning of the words as used in common conversation than in their etymological or professional sense. We would speak of a house as being untenanted when it was not occupied—when no one was living in it. And when the allocation of the varied condition is made with the statutory con-

Judgment. dition dealing with changes material to the risk it is
Boyd, O. obvious that the change emphasized by the variance is from "the dwelling house" (which is insured) to that house untenanted or vacant. The dwelling house insured was when insured a place of abode: before and at the time of the fire it had ceased to be this without any notice being given to the company.

If "untenanted" is read "unoccupied" (as I think it should be) the case is well governed by authority, and absence from personal occupation for a short time, say three days, would not be fatal under such conditions as was pointed out in the earliest case in Ontario: *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.* (1870), 17 Gr. 418, 423.

But the condition imports habitual actual residence in the house and the incidental care and supervision arising therefrom in protecting the property insured.

This was laid down in *Ashworth v. Builders Mutual Fire Ins. Co.* (1873), 112 Mass. 422, and the doctrine has been accepted by Canadian Courts; *Abrahams v. Agricultural Mutual Assurance Association* (1876), 40 U. C. R. 175, 184; *Peck v. Agricultural Ins. Co.* (1890), 19 O. R. 494; and *Bishop v. Norwich Union Fire Ins. Co.* (1893), 25 Nova Scotia R. 498. It is also regarded as the leading case in the later American decisions. *Stoltenburg v. Continental Ins. Co.* (1898), 76 N. W. R. 835; *Home Ins. Co. of New York v. Boyd* (1898), 19 Ind. App. Cas. 190; *Huber v. Manchester Fire Assurance Co.* (1895), 92 Hun 223; and *Agricultural Ins. Co. of Watertown, New York v. Hamilton* (1895), 82 Md. 88; S. C. 51 Am. S. R. 457, 463.

I think that as regards the insurers the condition is a proper and a reasonable one and not imposing an unfair burden on the insured as was indicated in *Peck v. Agricultural Ins. Co.*

The levy of assessment pending action and after defence filed by the company was a piece of improvidence which should not operate to re-establish the policy if they repay the assessment made upon the plaintiff forthwith. This

being done the action should be dismissed with costs on the lower scale.

Judgment.
MacMahon,
J

I may note that the plaintiff's own account of the condition of the premises at the time of the fire as expressed in the written part of the proof of loss indicates her view of the situation, "no person living in it at the time of the fire; the property has been vacant for five weeks; Boardman, the man occupying the house was there every day." This last statement was not proved, the visitation of the house was occasional or perhaps periodical but not daily.

March 6th, 1900. From this judgment the plaintiff appealed to a Divisional Court composed of ARMOUR, C. J., and STREET, J., when the appeal was dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

MEEK V. PARSONS.

Crown—Free Grants and Homesteads Act—Sale of Land to Take Effect After Patent—Validity of.

Section 16 of the Free Grants and Homesteads Act, R. S. O. (1887) ch. 25 (now R. S. O. ch. 29, sec. 19), which provides that "neither the locatee, nor anyone claiming under him, shall have power to alienate (otherwise than by devise) or to mortgage or pledge any land located as aforesaid, or any right or interest therein before the issue of the patent," does not prevent an agreement being entered into before the issue of a patent for the grant of land after the issue thereof, and where such agreement was entered into it was enforced after the issue of the patent and where all the requisites of section 8 of the Act had been complied with by the locatee.

Judgment of MACMAHON, J., *ante* p. 54, reversed, FALCONBRIDGE, J., dissenting.

THIS was an action for an injunction to restrain the defendant from interfering with the possession of the plaintiffs' free grant land, or for re-conveyance from the defendant, or for the return of \$400 purchase money paid for it.

The action was tried before MACMAHON, J., at Port Arthur, on June 9th. 1899 :—

Argument. The defendant set up as a defence that an agreement for the sale of the land was void, as in contravention of sec. 16 of "The Free Grants and Homesteads Act," R.S.O. (1887), ch. 25. He also counterclaimed for mesne profits and damages.

At the conclusion of the evidence, the learned Judge reserved his decision, and subsequently delivered judgment dismissing the plaintiffs' action, and gave judgment for the defendant on his counterclaim for mesne profits, and for damages occasioned by the injunction. The judgment is reported *ante* p. 54.

From this judgment the plaintiffs appealed and the appeal was heard on December 11th, 1899, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ.

Aylesworth, Q. C., supported the appeal.

D. E. Thomson, Q. C., and *Slaght*, contra.

January 22nd, 1900. ARMOUR, C. J.

Henry Parsons was on the 4th day of July, 1889, located under "The Free Grants and Homesteads Act" for lots 15 and 16 in the 1st concession of the township of Paipoonge, and on the 4th day of July, 1894, became entitled to the patent therefor under the said Act, and on the 4th day of August, 1894, the patent from the Crown for the said land was issued to him under the said Act.

Henry Parsons and Maria Parsons, his wife, entered into the following agreement with W. J. Barrie :

"Port Arthur, December 23rd, 1893.

We promise to sell to W. J. Barrie, of the town of Port Arthur, and Province of Ontario, photographer, lot fifteen (15), in the first concession in the township of Paipoonge, south of Kaministiquia river, one hundred acres (more or less) with all buildings and improvements thereon, for the sum of four hundred and fifty (\$450) dollars, to be paid

for as follows: Twenty-five dollars in cash on the first day of January, 1894; twenty-five dollars (\$25) in cash on the first day of March, 1894; and four hundred (\$400) dollars worth of photographic stock on the first of March, 1894. We also promise to give possession of said lot and improvements thereon to the said W. J. Barrie on or before the fifteenth day of April, 1894, and to procure deed of said lot from the Crown Lands Department as soon as possible after settlement duties has expired, and convey the said property to W. J. Barrie (aforementioned) with the said property free from all encumbrances of whatsoever kind. All of the above is hereby agreed to.

(Sgd.) Henry Parsons,

(Sgd.) Maria Parsons."

"Witness, J. H. Parsons."

The whole consideration mentioned in the said agreement was fully paid, the last of it, \$30.50, apparently having been paid on the 31st July, 1894.

Sometime in May, 1894, the Parsons, husband and wife, gave possession of the land mentioned in the said agreement to the said W. J. Barrie, and went to live at the Sault Ste. Marie.

Possession was given to Barrie, probably after the 14th May, 1894, as on that day Henry Parsons made affidavit for the purpose of obtaining the patent for the land that he was still residing upon and cultivating it.

Several letters of a very friendly character were written by Mrs. Parsons to Barrie after she left, commencing on May 25th, 1894, and ending on September 9th, 1894.

In one of July 17th, 1894, she said: "During the month of August, please pay to Mr. Donely the sum of six dollars.

* * The six dollars you can either deduct from the \$50 you are to pay on lot 15, or out of Mr. Parsons' wages.

* * With regard to the farm I am willing to purchase it if you wish to sell. I think \$100 besides the crop over the price you paid will pay for the improvements, and the crop you could sell to us at so much per bushel, and the stock at the rate you bought from us, and the increase at

Judgment. the full value. Now for my share of the mine I am willing to take the farm and two thousand dollars in cash, you to pay all debts against the mine. This offer stands good for two weeks only."

Armour, C.J.

In one written on the 6th August, 1894, she said: "In exchange for the mine I should want the farm with all the stock on the place: horses, cow, pigs, all the chickens, hens, ducks, implements, harness and utensils and the buggy, all the root crops and also the hay you have cut, and \$250 at the time of exchange, and \$900 when the mine is sold, and a small rate of interest, say 4 per cent., until the money is paid off. This is a splendid offer for you. Let me know in the course of a week or so whether you want it or not."

In one written on the 14th August, 1894, she said: "We will get lot 16 fixed up for a farm. It will do as well as 15. I am glad you are pleased with the farm."

In one written on the 5th September, 1894, she said: "You will pay the taxes on both lots, and deduct it out of purchase money. This year's taxes on lot 15 will of course not be chargeable against us; at the time we sold to you I think there was about \$36 on the two lots."

And in another written on the 9th September, 1894, she said: "Mr. Monroe says he only wants the taxes paid then; can register Mr. Parsons as owner of the land. The patent for 15 and 16 are in one. When the taxes are paid Mr. Parsons will attend to the deed. He prefers doing it himself as no mistakes can then occur. The taxes I will write to Mr. McLaren about, as on lot 16 they charged the first year before I had located; he will take that off. This year's taxes on lot 15 will of course be yours to pay. I suppose we will get things arranged sometime soon. If anything has to be paid for registering deed, please pay it. I think Mr. Parsons ought to have stayed at Port Arthur until deed came out; it will be a bother now."

In the fall of 1895, Parsons and his wife came back and tried to get possession of the lot in question; and on the 15th October, 1895, Barrie obtained an interim injunction

restraining them from interfering with his possession of Judgment.
the said lot, which said injunction was on the 5th day of Armour, C.J.
November, 1895, continued to the hearing.

Parsons died on the 6th day of June, 1896, and his wife is his executrix; and Barrie died on the 11th August, 1896, and the plaintiffs are his administrators, and the action was revived.

At the trial all the above facts were substantially admitted; and the defendants' counsel put his defence solely on the ground that the agreement was void, and could not be enjoined.

The agreement entered into and above set forth was clearly not in contravention of the letter of "The Free Grants and Homestead Act," R. S. O. ch. 29 sec. 19 (sec. 16 of ch. 25 R. S. O., 1887) of which provides, that "neither the locatee, nor any one claiming under him, shall have power to alienate (otherwise than by devise) or to mortgage or pledge any land located as aforesaid or any right or interest therein before the issue of the patent."

The word "alienate" in this section is a technical word and is used in its technical meaning, and the agreement in question cannot be held to be an alienation under this section.

"Alienation is as much as to say as to make a thing another man's, or to alter or put the possession of lands or other things from one man to another: *Termes de la ley*, 37. See also Coke's Inst., 118b; Cruise's Dig., vol. 4, p. 3.

"The word, 'alienate,' has a technical legal meaning, and any transfer of real estate, short of a conveyance of the title, is not an alienation of the estate. No matter in what form the sale may be made, unless the title is conveyed to the purchaser, the estate is not alienated:" *Masters v. Madison County Mutual Ins. Co.* (1852), 11 Barb. 624. See also *Sands v. Standard Ins. Co.* (1878), 26 Gr. 113, 27 Gr. 167.

Judgment. Nor do I think that the agreement in question is in *Armour, C.J.* contravention of the spirit or policy of the Act.

As soon as the patent issued the husband and wife in the present instance could have alienated the land.

And if the present agreement had been entered into by them after the patent had issued, I have no doubt that it would have been enforceable and would have been enforced by this Court.

And I see no reason why the present agreement, although entered into before the patent had issued, but not to be carried out by the vendors until after the patent should have issued, should not be enforceable, and should not be enforced by this Court.

The agreement was not to be carried out until after the locatee had himself performed and fulfilled all the requirements of section 8 of the Act to ensure which seems to have been the object of the restraint upon alienation.

I am therefore of the opinion that the land mentioned in the agreement should be vested in the plaintiffs as administrators of the said W. J. Barrie : that the injunction should be made perpetual ; and that the defendant should pay the costs of this action.

FALCONBRIDGE, J. :—

I think the judgment appealed from ought to be affirmed.

The intention of the statute is clear. The legislation is parental. The locatee, up to the issue of the patent, is treated as an infant—the ward of the Province.

The object of the enactment being plain, it is not for the Court to criticise its policy or wisdom, nor to devise or sanction means of evading it.

The contract here is an equitable alienation of the land, and is within the purview of the section.

There is a strong family resemblance between this case and the cases in which it was sought to deprive an infant of the protection which the law affords him, by

efforts to convert that which arises out of a contract into Judgment.
a tort.

Falconbridge,
J.

A specimen case is *Jennings v. Rundall* (1799), 8 T. R. 335, and see Lord Kenyon's remarks thereon.

I refer to the authorities cited by the present Chief Justice of the Queen's Bench in *Macdonald v. Crombie* (1883), 2 O. R. 243, at pp. 259, 260. I do not think there is anything in the opinions of the majority of the Court in that case, nor in the judgment of the Court of Appeal, (1884), 10 A. R. 92, and of the Supreme Court (1885), 11 S. C. R. 107, to impair the principle of law laid down in those authorities.

STREET, J., concurred with ARMOUR, C. J.

G. F. H.

[DIVISIONAL COURT.]

MACGREGOR V. SULLY.

Master and Servant—Articles of Apprenticeship—Unreasonable Provision—Non-liability.

Articles of apprenticeship which require the apprentice during the term of four years of three hundred and ten working days of ten hours each, to give and devote to a firm, to whom he is apprenticed, ten hours each working day, or such number of hours as may be the regulation of the workshop for the time being, or as special exigencies of the business may require, are unreasonable and cannot be enforced against the infant, nor against a surety for him.

THIS was an appeal from the County Court of the Statement.
county of Waterloo.

The action was brought under certain articles of apprenticeship entered into on the 8th November, 1897, between the plaintiffs, MacGregor, Gourlay & Co., carrying on business at Guelph as iron workers, and the defendant J. G. Sully, and one Charles McFarquhar, under which McFarquhar became apprenticed to the plaintiffs, they agreeing to teach him the art or trade of iron turn-

Statement. ing, and the defendant agreeing to pay to the plaintiffs for so instructing him, a fee of \$300, which was to become payable in the event of the said McFarquhar's dismissal, or on his leaving the plaintiffs' employment, or at the expiration of the term; and it was also agreed that the defendant would pay any damages sustained by the plaintiffs in the event of McFarquhar's disobedience, or his committing any unlawful act.

McFarquhar entered on his apprenticeship and worked for the plaintiffs until the 2nd February, 1899, when, as the plaintiffs claimed, he wilfully and wrongfully absented himself, whereby the fee of \$300 became payable. The plaintiffs also claimed the sum of \$100 for damages, for alleged disobedience.

The defendant set up that the articles were invalid as being contrary to public policy, in that the defendant did not come within the R. S. O. ch. 161, not being the parent or guardian of the apprentice; that they were also invalid as they purported to bind McFarquhar beyond his minority and were oppressive to him and also unreasonable and disadvantageous to him, and were also invalid as being in restraint of trade.

The defendant also claimed that the fee of \$300 never became payable as the plaintiffs did not dismiss McFarquhar; nor did he leave their employment in breach of any agreement binding on him; and that he did not leave on the expiration of his term.

The defendant also set up that the fee was a penalty; and that the plaintiffs, if they could recover anything at all, could only recover whatever damages they had sustained.

The defendant also claimed that being merely a surety he was not bound under the circumstances.

The defendant further said that the conditions under which McFarquhar worked were unwholesome, and he, by reason thereof, suffered in his health and was therefore justified in leaving the plaintiffs' employment.

The action was tried before the Judge of the County Court of the county of Waterloo, who, at the conclusion

of the evidence, gave judgment in favour of the plaintiffs Statement.
for the \$300 with costs; but dismissed the claim for damages.

From that part of the judgment allowing the plaintiffs the \$300 the defendant appealed to the Divisional Court.

On December 13, 1899, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ., the appeal was argued.

Riddell, Q. C., for the appellants. The articles are not binding either at common law or under the statute, R. S. O. ch. 161, sec. 6. Only a parent or guardian is empowered to enter into such a contract, nor can it bind an infant beyond his minority: Am. & Eng. Encyl. of Law, 2nd ed., "Apprentices," vol. 2, p. 408 *et seq.* The articles are also unreasonable in that they do not contain any provision that the plaintiffs were to find work for the apprentice: *De Francesco v. Barnum* (1890), 45 Ch. D. 430. The \$300 cannot be recovered as liquidated damages. It was not fixed as an apprenticeship fee but is merely as a penalty, and only the damages actually sustained can be recovered. There was no breach of the agreement. The defendant never was dismissed, nor did he leave the plaintiff's employment in breach of any agreement, nor at the expiration of his term. As a matter of fact the premises were so unwholesome that he suffered in his health, and therefore could not be compelled to remain in the plaintiff's employment: *Green v. Thompson*, [1899] 2 Q. B. 1.

Shepley, Q. C., contra. This is a good and valid agreement under the common law as well as under the statute. The defendant had the right to enter into the contract and bind the minor; and he is therefore bound. The question to be decided in every case is whether its provisions are, or are not, inequitable as regards the infant. It is a reasonable contract, and was for the benefit of the infant, as the plaintiffs were not only bound to instruct

Argument. the infant, but he was enabled to earn a livelihood. It is not necessary that the contract should contain a provision that the plaintiffs should find work for the infant. The contract does not say they are not to furnish work, and the reasonable construction is that they are to find work for him so long as he is in their employment: *Macpherson on Infants*, p. 479-80; *Eversley on Domestic Relations*, 931 *et seq.*; *Simpson on Infants*, 93-96; *Leslie v. Fitzpatrick* (1877), 3 Q. B. D. 229; *De Francesco v. Barnum* (1889), 43 Ch. D. 165; (1890), 45 Ch. D. 430; *Gilbert v. Schwenck* (1845), 14 M. & W. 488. The \$300 was liquidated and the contract provides that it should be a fee payable for teaching the infant his trade. It can in no sense be looked upon as a penalty: *Ford v. Earl of Chesterfield* (1854), 19 Beav. 428; *Thompson v. Hudson* (1869), L. R. 4 H. L. 1; *Ex p. Bennett* (1743), 3 Atk. 527; *Galsworthy v. Strutt* (1848), 1 Ex. 659, 665; *Saintier v. Ferguson* (1849), 7 C. B. 716; *Green v. Price* (1845), 13 M. & W. 346; *Reynolds v. Bridge* (1856), 6 E. & B. 528; *Mercer v. Irving* (1858), E. B. & E. 563. There was a clear breach of the agreement when the defendant left the plaintiffs' employment. No complaint was ever made of his being ill. The whole object was to procure higher wages.

January 30, 1900. ARMOUR, C. J.:—

The defendant covenants that the apprentice shall give and devote to the plaintiffs ten hours during each working day, or such other number of hours, according to what may be the regulations of the workshop as to the hours of working for the time being, or as special exigencies in business may require, that is, ten hours, or more or less; and the agreement requires the apprentice to serve from the day of the date thereof, for and during the term of four years, each of said years to consist of, or to be equal to in the aggregate, three hundred and ten working days of ten hours each.

These provisions are clearly unreasonable, for if the

plaintiffs should reduce the number of hours during each ordinary working day, the apprentice would be bound to serve the plaintiffs for a much longer period than he would if the number of hours should not be reduced, and would receive a correspondingly less amount for the ordinary day, being only paid so much for each working day of ten hours worked, and as he is obliged to pay his own board and lodging (except while absent from the shop attending to the plaintiffs' work in the country), he might not in that case, receive enough for each ordinary day, to pay his board and lodging for that day. Judgment.
Armour, C.J.

The appeal must therefore be allowed with costs, and the action in the Court below dismissed with costs.

FALCONBRIDGE, J. :—

I should have been glad to know the grounds on which the judgment of the learned Judge was based. For example, the evidence of the apprentice McFarquhar was that he left plaintiffs' employment by reason of ill-health: that he had been subject to catarrh, and that the shop was too cold and cold settled on his lungs; and that he complained, not to Mr. Hamilton but to the other "boss" in the shop, and this is not contradicted by Hamilton, who only says as far as he could observe McFarquhar was not ill, and that there was one time he (McFarquhar) was away for a period, and witness was told McFarquhar was at home sick. The other "boss" was not called.

Permanent illness is a good plea in excuse of performance of personal service without any averment that plaintiff had notice of the illness before the commencement of the action: *Boast v. Firth* (1868), L. R. 4 C. P. 1.

If the Judge simply disbelieved McFarquhar, his so finding would have been of assistance to us: *Gurofski v. Harris* (1896), 27 O. R., at p. 203.

But the provisions of the indenture are unreasonable, and could not be enforced against the infant, in this that during the term (four years from the 10th September,

Judgment. 1897), he was to faithfully serve the plaintiffs, while they
Falconbridge, were to instruct him and pay him certain sums for each
J. day of ten hours worked during each year of said term. But there is no obligation on the plaintiffs to provide work, and no provision for remuneration except for days actually worked.

The instrument is, therefore, not one by which the infant was bound, and so no action can be maintained against the defendant: *De Francesco v. Barnum* (1890), 45 Ch. D. 430; *S. C.*, (Mo. for Inj.) (1889), 43 Ch. D. 165; *Regina v. Lord* (1848), 12 Q. B. 757; *Meakin v. Morris* (1884), 12 Q. B. D. 352; *Corn v. Matthews*, [1893] 1 Q. B. 310; *Green v. Thompson*, [1899] 2 Q. B. 1; *Leslie v. Fitzpatrick* (1877), 3 Q. B. D. 229.

The appeal must be allowed and the motion dismissed.

STREET, J.:—

I agree in the conclusion arrived at by my brother Falconbridge, that the apprenticeship deed in question is not binding upon the infant, and that the plaintiffs cannot recover the amount for which this action is brought.

The deed, which is executed by the defendant, as well as by the infant and the plaintiffs, purports to bind the infant to the plaintiffs as their apprentice, for "four years, each of said years to consist of, or be equal to (in the aggregate) three hundred and ten working days of ten hours each." The defendant covenants with the plaintiffs, *inter alia*, that during the said term of four years, the infant "shall give and devote to them ten hours during each working day, or such other number of hours according to what may be the regulations of the workshop as to the hours of working for the time being or as special exigencies in business may require."

The plaintiffs, on their part, covenant with the infant that they will teach and instruct him, or cause him to be taught and instructed, "in the art, trade, or mystery of an iron turner, and to pay, or cause to be paid to the party of

the second part (the infant), the sum of forty cents for each working day of ten hours worked during the first year of said term: the sum of forty-five cents for each day of ten hours worked during the second year of said term: the sum of fifty cents for each day of ten hours worked during the third year of said term; and the sum of sixty cents for each day of ten hours worked during the fourth year of said term * * ; and a bonus of twenty-five dollars if full time is served." The defendant and the infant jointly and severally covenant with the plaintiffs to pay to the plaintiffs "for and in consideration of their receiving the infant as an apprentice and agreeing to instruct him as an apprentice, a fee of \$300, which shall become payable on the dismissal of the infant, or his leaving the employment of the plaintiffs, either on breach of his agreement or at the expiration of his term of apprenticeship.

Judgment.
Street, J.

According to the provisions of this deed, the infant is bound to the plaintiffs exclusively for the full period of four years, each year to be composed of three hundred and ten days of ten hours each; but he is only bound to work, during each day, the number of hours prescribed by the plaintiffs, and the plaintiffs only agree to pay him for the number of hours which they may prescribe, ten of such hours making up one day and entitling the infant to the remuneration fixed for one day's work.

It seems to follow that if the plaintiffs should deem the exigencies of business to require them to cut down the hours of work in their workshop to two hours a day, the infant could earn only one working day's pay in five ordinary days; in other words, the plaintiffs reserved to themselves the right to stop his work and wages in their discretion from time to time during the period for which he was bound to them.

I think the case comes clearly within the authority of *Regina v. Lord* (1848), 12 Q. B. 757, which has been recognized as law in all the subsequent cases: *Leslie v. Fitzpatrick* (1877), 3 Q. B. D. 229; *Meakin v. Morris* (1884), 12 Q. B. D. 352; *De Francesco v. Barnum* (1890),

Judgment. 45 Ch. D. 430; *Corn v. Matthews*, [1893] 1 Q. B. 310;
Street, J. *Green v. Thompson*, [1899] 2 Q. B. 1; and the deed is in my opinion, not binding upon the infant.

The \$300 sued for is not payable to the plaintiff by the defendant, under the terms of the deed, in the view I have taken of the effect of its terms, for the infant has neither been dismissed by the plaintiffs, nor has he left their employment in breach of his agreement. It was never binding upon him, and there could therefore be no breach of it.

In my opinion the appeal must be allowed with costs, and the judgment of the Court below must be reversed, and judgment entered for the defendant with costs.

G. F. H.

[DIVISIONAL COURT.]

IN RE MICHELL, AND THE PIONEER STEAM NAVIGATION CO.

District Courts—Unorganized Territory—Jurisdiction—Vendors and Purchasers Act—R.S.O. ch. 109, sec. 7.

Notwithstanding anything in R.S.O. ch. 109, sec. 7, and R.S.O. ch. 51, sec. 185, Judges of District Courts who are local Judges of the High Court, have no jurisdiction to deal with applications under the Vendors and Purchasers Act, or under the Land Titles Act.

Statement. THIS was an appeal to the Divisional Court by The Pioneer Steam Navigation Co., a partnership composed of one L. R. Johnston and Harriet his wife, from a decision of His Honour Judge Chapple, sitting as local Judge of the High Court in the district of Rainy River.

It appeared that one Michell and his wife had entered into a contract under seal with Johnston and his wife for the sale by the former to the latter of certain lands in the town site of Waubigoon in the Rainy River district. The purchasers having refused to carry out their agreement by reason of certain objections raised by them to the title, the

vendors made a summary application by motion to Judge Chapple, the Judge of the District Court as a local Judge of the High Court, styling their proceedings as being taken under R. S. O. ch. 134, known as "the Vendors and Purchasers Act," and asking under the 4th section of the Act for such relief as they might be entitled to against the purchasers. The Judge proceeded to hear the parties, both of whom appeared before him and expressly waived objection to his jurisdiction. After considering the matter upon its merits the Judge made an order for the taking of an account of the amount due by the local Master at Rat Portage; directing the vendors to tender to the purchasers a transfer and to produce a certificate of ownership shewing the vendors to be seized in fee of an absolute title in the surface rights in the lands in question; directing the purchasers to accept such transfer and to pay the purchase money, and that on default of such payment the vendors might issue execution for the purchase money; and declaring that in the event of the vendors not being able to produce such certificate of ownership the purchasers should not be bound to accept a qualified title, and refusing to make any order as to costs. Statement.

The purchasers gave notice of appeal to the Divisional Court from this order both upon the merits and upon the ground that the Judge had no jurisdiction to entertain such an application.

The appeal was heard on January 23rd, 1900, before the Divisional Court (ARMOUR, C.J., and FALCONBRIDGE, and STREET, J.J.).

C. C. Robinson, for the appellants, contended that there was nothing in R. S. O. ch. 134, to enable any Judge to order specific performance of a contract as had been done here; and that the local Judge had no jurisdiction to entertain the motion at all.

Ferguson, for the respondents, referred to R. S. O. ch. 51, sec. 185; *Fox v. Fox* (1896), 17 P. R. 161.

Judgment. February 5th, 1900. ARMOUR, C.J.:—

Armour, C.J.

I am of the opinion that the Judges of the District Courts appointed under the provisions of the Unorganized Territory Act, R. S. O. ch. 109, are Judges of the High Court for the purposes of their jurisdiction in actions in the High Court, and may be styled "local Judges of the High Court."

This jurisdiction is conferred upon the Judges of the several County Courts in this Province, except in the county of York, by sec. 185 of the Judicature Act, R. S. O. ch. 51.

And the like jurisdiction is, in my opinion, conferred upon the Judges of the District Courts by sec. 7 of R. S. O. ch. 109, which provides that "the laws and rules now in force or which may be hereafter passed with respect to County Courts or the power, authority or jurisdiction of the Judges of such Courts, whether sitting in or out of Court, shall, unless there is something in the context indicating a different intention or unless the same is contrary to the express provisions of this Act, also apply to every judicial district."

And by section 185 of the Judicature Act, such Judges "shall in all causes and actions in the High Court have, subject to the rules of Court, power and authority to do and perform all such acts, and transact all such business in respect to matters and causes in and before the High Court as they are by statute or Rules of Court in that behalf, from time to time, empowered to do and perform."

But nowhere in any statute or Rule is any power or authority given to such Judges to deal with applications under "The Vendors and Purchasers Act," R. S. O. ch. 134, sec. 4, or under "The Land Titles Act," R. S. O. ch. 138.

The proceedings, therefore, had in this case before the learned Judge were without jurisdiction and void and must be set aside.

But as they were had by consent of both parties there will be no costs here or below.

FALCONBRIDGE, J. :—

Judgment.

I, too, think that the learned Judge of the District Court had no jurisdiction in the premises, and I agree that the proceedings before him should be set aside without costs.

Falconbridge,
J.

STREET, J. :—

I am also of opinion that the learned Judge of the District Court had no jurisdiction even by consent to deal with the matter in question here.

The Rules of Court do not anywhere refer to "The Vendors and Purchasers Act," nor profess to prescribe any practice to be followed in proceedings taken under it, and I am of opinion that they should not be held to be any where speaking with regard to it. No doubt the practice to be followed under that Act would be treated as regulated by the analogy furnished by the practice in proceedings of a similar character as laid down by the Rules, but that is a very different matter from treating the Rules as conferring jurisdiction in a matter to which no reference is made in the Rules.

The appeal should, therefore, be allowed, but without costs.

A. H. F. L.

[DIVISIONAL COURT.]

TORRANCE V. CRATCHLEY.

Lien—Mechanics' Lien—Twenty Per Cent. Reserve—Payment Before Expiry of Thirty Days—R.S.O. ch. 153, sec. 11.

The owner of a building is not prohibited from making payments, before the expiry of the thirty days from completion out of the twenty per cent. reserve required by R.S.O. ch. 153, sec. 11, to persons entitled to liens, but he makes such payments at his own risk as against anyone ultimately prejudiced by such payment.

Statement. THIS was an appeal in a case brought under the Mechanics Lien Act R. S. O. ch. 153, by a person entitled to a lien for material furnished to the defendant Cratchley. The owner, F. G. Clarke, was made a defendant and the present appeal was by him from a decision of the referee ordering him to pay a sum of \$94.56 under the following circumstances. The contract of the defendant Cratchley with the owner was for the carpenter work upon a certain building, and the contract price was \$2,200. So far as appeared no work was done upon the building nor were any materials furnished later than August 10th, 1899. At that date the contractor had done all the contract work excepting a few trifling matters estimated by the architect at \$25, and he had done \$45 worth of work in respect of extras, so that the total amount then earned by him was \$2,220. The payments made by the owner were \$1,770.70, leaving a balance unpaid of \$449.30.

The contractor had been in default to his workmen in paying their wages on July 22nd, 1899, and the owner on that day had paid to the contractor \$50 for the express purpose of paying these wages, and it had been so applied. On July 31st, the workmen notified the architect that unless their wages were paid they would stop working and register liens and the architect thereupon paid them \$45.70 on the owner's behalf. Both these sums were included in the \$1,770.70 above mentioned. The only material furnished after the payment of July 31st was

four pairs of hinges of the value of thirty cents charged by one Allan, a lien holder, on August 10th, 1899. The last work done upon the building appeared from the claims to have been done on August 11th, 1899. Statement.

On the 14th August, 1899, four of the workmen whose wages remained unpaid and who (as was admitted) were entitled to liens for the sum of \$94.56, brought to the solicitor for the owner, liens which they had prepared for that amount, and informed him that unless they were paid at once they would register the liens. Thereupon for the purpose of saving further expense the owner through his solicitor paid the amount and \$4 additional for the costs of preparing the liens. Under these circumstances the official Referee held that the owner was not entitled to deduct this sum of \$94.56 from the twenty per cent. which he is required by the 11th section of the Act R. S. O. ch. 153 to retain to answer liens, and directed him to pay into Court the full amount of the twenty per cent. on \$2,220 = \$444, without deducting, as he had done, this sum of \$94.56. From this decision the owner appealed to the Divisional Court and the sole question raised upon the appeal was whether or not the owner was entitled to deduct this sum of \$94.56 from the \$444, which he was required to retain for the lien holders, or not. The present proceedings were begun by the filing of a lien on August 24th, 1899. The sum paid into Court by the owner after deducting the \$94.56 was sufficient to pay all wage earners in full, and to leave a considerable sum applicable to the liens of persons who supplied materials, but was not sufficient to pay the latter in full.

The motion was argued before ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ., on January 25th, 1900.

Ritchie, Q.C., for the appellant, contended that inasmuch as it was not disputed that the money paid to the wage-earners would have had to have been paid to them when

Argument. the matter was in the Master's office no one was prejudiced, and the appellant should not be penalised by having to pay the money over again, though of course the appellant paid it before the expiration of the thirty days at his own risk: *Russell v. French* (1897), 28 O. R. 215; *McBean v. Kinnear* (1892), 23 O. R. 313; *Holmested's Mechanics Lien Act*, 2nd ed., pp. 66, 77, 97.

J. Douglas, for the plaintiffs, contended that the owner was bound to keep the twenty per cent. intact as a fund for payment of the men until the expiration of the thirty days, and that *Russell v. French* was not in point because the point of time for distribution of the fund had arisen there before the money was paid. He also referred to *Truax v. Dixon* (1889), 17 O. R. 366.

Cooke, for a lien holder, cited *Reggin v. Manes* (1892), 22 O. R., at p. 448; *Re Cornish* (1883-84), 6 O. R. 259; *In re Sear and Wood* (1892), 23 O. R. 474.

Rowan and Cavell, for other lien holders.

January 30th, 1900. STREET, J.:—

The object of the eleventh and following sections of the *Mechanics and Wage-Earners Lien Act*, R. S. O. ch. 153, was plainly to ensure to persons intended to be protected by the Act the formation of a fund in the hands of the owner equal to one-fifth of the contract price or of the amount of work done, as the case might be, to which they might resort in case of the failure of the contractor to pay them. This fund is to be ascertained at the completion or abandonment of the work, and the owner is directed to retain it in his hands for a period of thirty days from that time.

In the present case, I think it must be taken upon the evidence before us, that the work upon this building was abandoned from August 11th, 1899, at which date the last work which has ever been done upon it was done. The contractor had been in trouble with his workmen for some three weeks before that date; they had only been

prevented from taking proceedings on July 31st, by an advance of money made by the owner; they all ceased work on August 11th, and no material except thirty cents worth of hinges delivered on August 10th, had been delivered since July 31st by any person. If the work was not finished on August 11th, it has never been finished since that date, and must be taken to have been abandoned, and if abandoned it was abandoned on August 11th after the last work had been done. The twenty per cent. to be retained was therefore properly to be ascertained on August 12th, 1899, and it is not disputed that whether fixed at that date or at any subsequent date the amount fixed is properly fixed at \$444. On August 14th, 1899, the claims of four wage-earners entitled to liens for \$94.56, and whose liens were prepared and ready for registration were presented to the owner for payment with the threat that unless paid at once they would be registered and enforced, and he paid them in order to save the further cost of the threatened proceedings. The other lien holders say that he must pay this amount over again because they are entitled to have at the end of thirty days the whole of the twenty per cent. upon the contract price for distribution. It is necessary to consider the object of the provision requiring the owner to retain the twenty per cent. for thirty days and the effect of the payment by the owner of the \$94.56 within that period in order to determine whether the owner must pay it again or not. The only object of the provision requiring the owner to retain the twenty per cent. for thirty days appears to be that indicated by sub-section 3 of section 11, viz., to give persons entitled to liens an opportunity of enforcing them against the fund directed to be retained. As to the effect of the premature payment of the \$94.56 it is quite plain that the position of all lien holders is precisely the same as if the owner had retained the \$444 in his hands for the full period of thirty days from August 12th, 1899, and had then distributed it according to legal priorities or had paid it into Court.

Judgment.
Street, J.

Judgment. At the end of the thirty days the wage-earners to whom the
Street, J. \$94.56 was paid on August 14th would have been entitled to receive that sum, and the other lien holders would have been entitled to the balance. No one is injured by the fact that the owner paid the \$94.56 at the beginning instead of at the end of the thirty days and therefore no one can properly complain.

There is no doubt that the owner by making a payment before the expiration of the thirty days takes the responsibility of shewing that he places the other lien holders in no worse position by doing so, but here the owner has succeeded in shewing this, and he should not be ordered, therefore, to pay it over again.

Section 12 of the Act was much urged upon us as supporting the lien holders' contention. That section appears, however, merely to give authority to the owner without the consent of the contractor, but upon mere notice to him, to make payments out of the contract price direct to persons who would be entitled to liens, limiting, however, the right to make such payments to the moneys which the owner is not directed to retain under the 11th section. It does not apply at all to the moneys which the owner is directed to retain, and therefore it does not affect the present case.

In my opinion the appeal should be allowed with costs here and below, and the owner declared entitled to deduct the \$94.56 from the fund which he is directed to retain.

ARMOUR, C.J., concurred.

FALCONBRIDGE, J.:—

I think that the learned Referee erred in holding that the payment of the \$94.56 made by the defendant Clarke to Steel and other lien holders for wages before the expiration of the thirty days after completion or abandonment of the contract, was not a good and valid

payment *pro tanto* of the twenty per cent. required to be retained under R. S. O. ch. 153, sec. 11.

Judgment.
Falconbridge,
J.

Clarke paid before the time at his own risk of Steel *et al.* being persons properly entitled, and perhaps of having the onus cast on him to shew that the respondents could not be prejudiced by such payment in advance of the expiry of the thirty days, and in both aspects he is here justified by the result.

The judgment of the official Referee will be amended so as to declare that the sum of \$354.74 paid into Court by Clarke is sufficient to discharge the lands mentioned in the judgment from the liens mentioned therein, and to order the said liens to be vacated and discharged, with costs here and below, to be paid by the persons who opposed this appeal.

A. H. F. L.

[DIVISIONAL COURT.]

GLOVER V. SOUTHERN LOAN AND SAVINGS COMPANY.

*Mortgage—Execution Creditors—Mortgage Sale—Application of Surplus—
Payment Off of Lien Notes—Liability to Account for Notes.*

A part owner of a farm joined in promissory notes as surety for the purchaser of a machine, and also gave a lien on his share of the land as further security. Subsequently his interest passed to his co-owner, of whom the plaintiffs were execution creditors under judgments subsequent to the lien. The defendants, being mortgagees of the whole farm prior to the lien, afterwards sold under their power of sale, and out of the proceeds paid off the lien, and the notes were assigned in 1894 by them to an execution creditor subsequent to the plaintiffs, who held them till 1898, and then sued on the notes without result, as the maker had become insolvent. It was shewn that if the maker had been sued in 1895, by which time the notes had become payable, the amount of them would have been recoverable:—

Held, that the notes were not paid by the application of the proceeds of the sale in discharge of the lien at a time when they had not matured, the payment not having been made by the party primarily liable, the lien being given as a security only, and that the defendants should have secured the notes for the execution creditors generally, and were bound to account to the execution creditors for the amount paid in respect of them to the vendors of the machine, though under the circumstances without interest.

Statement.

THIS was an action brought by John H. Glover, on behalf of himself and certain execution creditors of G. S. Ballagh, against the Southern Loan & Savings Company, and Agnes J. Ramsdell, claiming \$500 damages and such further and other relief as the nature of the case might require in respect to certain alleged wrong done to them under the circumstances set out in the judgments.

The action came on for trial before MEREDITH, J., on March 26th, 1899, at St. Thomas, who referred all matters in question to the local Master there, reserving further directions and costs.

On May 12th, 1899, the local Master reported that the plaintiff had failed to establish any claim against the defendants.

An appeal from this report was heard before MEREDITH, J., on May 25th, 1899, when counsel for the parties, consented that the motion should be turned into a motion for final judgment, and it was thereupon adjudged that

the motion by way of appeal should be dismissed with costs, and the action dismissed without costs. Statement.

The plaintiff appealed to the Divisional Court, and the appeal was heard on November 16th and 17th, 1899, before BOYD, C., FERGUSON, and ROBERTSON, JJ.

Aylesworth, Q.C., and *J. Crawford*, for the plaintiff, contended that the execution creditors of George Ballagh were entitled to be subrogated to his rights in respect to the promissory notes in question; that the defendants held them in trust for the persons entitled, just as they would have held that part of the surplus which went to pay off the notes; that the notes had not been paid, but only Taylor's creditor changed; and it was the right of a person who has paid the debt of another to have any securities which the creditor holds against that other: *Neff v. Miller* (1848), 8 Barr. (Penn.) 347; *Quay v. Sculthorpe* (1869), 16 Gr. 449; *Joseph v. Heaton* (1856-59), 5 Gr. 636; *S. C.*, in App. 1 E. & A. 292.

W. A. Wilson, for Agnes J. Ramsdell, submitted that it should be affirmatively shewn that the state of the account between George Ballagh and Robert Ballagh, was such that George ought not to have paid off the lien for the machine; that George's lands were liable for the payment, and it was not as though a stranger had paid the notes, and that the notes were discharged when they were paid: *Central Bank of Canada v. Garland* (1890), 20 O. R. 147; that the assignment to Nickerson had no effect whatever, as she never paid any consideration for it; that the notes were the same thing as the lien which had been paid and did not represent any separate liability: Bills of Exchange Act, 1890, 53 Vict. ch. 33, sec. 59 (D.); *Harmer v. Steele* (1849), 4 Exch., at p. 13; *Maclaren* on Bills and Notes, 2nd ed., p. 323; that the mortgagee was bound to distribute the surplus as directed by the Act, R. S. O. 1887 ch. 121, sec. 25; that if there was any cause of action the damages accrued five years ago; that the lien for the price

Argument. of the machine having been satisfied, the plaintiff might have seized the machine under his writ of *fi. fa.* : *Exley v. Dey* (No. 2) (1893), 15 P. R. 405.

J. Farley, Q. C., for the Southern Loan Company, contended that it was no duty of the mortgagees, as trustees, to ask for the notes, that the defendants had done nothing to prevent the plaintiff from executing his rights as a judgment creditor, of George Ballagh; that for all that was shewn George Ballagh might have agreed to pay off the liens as part of the purchase money for the land, and if he did so, the defendants could not be liable in this action; that the notes and the lien were one and the same thing, and indistinguishable: *Bank of British North America v. Jones* (1851), 8 U. C. R. 86; *Am. & Eng. Encyc. of Law*, 1st ed., vol. 1, p. 356; *Re Bokstal* (1896), 17 P. R. 201.

Aylesworth, in reply, contended that the lien in question had not been discharged except in the sense that it had been cut out by the sale; that there had been no payments on behalf of the parties to the notes so as to extinguish them under the Bills of Exchange Act; that the machine was never the property of George Ballagh, and therefore could not have been seized under the writ of *fi. fa.*, nor was there any garnishable debt owing by Taylor to George even after the transaction by which the lien was paid: *Jackson v. Cassidy* (1882), 2 O. R. 521.

January 8th, 1900. BOYD, C. :—

George Ballagh was owner of a farm subject to mortgages to the defendants, and also subject to a lien for the price of a machine purchased from the Sawyer-Massey Company. The machine had been bought by one Taylor, and promissory notes were given for the price by Taylor and one Robert Ballagh, as surety for Taylor. Robert Ballagh then owned part of the farm and also gave a lien on the land for the price. The plaintiffs recovered judgment against George Ballagh and placed an execution against lands in the sheriff's hands, which bound George's estate

Judgment:
Boyd, C.

and interest in the lands as the then sole owner (he having acquired Robert's share in the farm). The defendant mortgagees next exercised the power of sale and sold the farm for enough to pay their mortgages and the lien charged on the land. Certain subsidiary dealings took place, but the upshot was that the lien was satisfied out of the proceeds of sale of the land, and an assignment was taken at the instance of the solicitor for the mortgagees, both of the lien paper and the notes which it guaranteed, to one Mrs. Nickerson, who was an execution creditor, for a small amount, subsequent to the plaintiffs' executions. This assignment was made by the Sawyer-Massey Company, on February 17th, 1894, and is made to her absolutely. Some negotiations were had in November, 1894, between the defendants' solicitor and the plaintiffs' solicitor, with a view to transfer the notes made by Taylor and Robert Ballagh, to the plaintiffs, but for some unexplained reason, they fell through, and the notes were still held under the assignment till Mrs. Nickerson brought an action upon them in December, 1898, which turned out fruitless, as both makers were worthless. It is proved that had Taylor been promptly proceeded against in 1895, when the notes would be payable on account of the default, the amount due upon the notes would have been recovered, and he was the person properly liable to pay, as he bought and had the machine.

The duty of the mortgagees in selling the land and paying off the liens so as to clear the title for the purchaser, was to get in the notes forming part of the security for the machine, the price of which was charged upon the land.

The notes were not paid by the application of the proceeds of the land in discharge of the lien, because the person to pay as principal was Taylor, and the land was pledged merely as security for him. If there had been no execution creditors, George, the mortgagor, would have been entitled to the surplus of the sale moneys and collateral securities, which would be represented by the notes

Judgment. in question. But the execution creditors, the plaintiffs, had
Boyd, C. intervened, their executions were current in the sheriff's hands, of this the mortgagees were aware, and the notes should have been secured for the execution creditors according to their priority (or at all events for them *pari passu*). But the notes being assigned to Mrs. Nickerson absolutely, it was not in the power of the mortgagees to fulfil their obligation to the plaintiffs, or if they could have procured a reassignment from Mrs. Nickerson, or a declaration that she held in trust for all execution creditors, they have not done so. The result appears to be that from the act of the mortgagees, or their inaction, the value of the notes has been lost to the execution creditors.

The only material question of law which arises in this case turns upon the payment or non-payment of the notes by the application of the proceeds of sale of the land. That satisfied the claim of the Sawyer-Massey Company, but it did not pay the notes or satisfy the debt on the part of Taylor, who was primarily and ultimately the person to pay. The cases referred to, *Harmer v. Steele* (1849), 4 Exch. 1, and sec. 59 of the Bills of Exchange Act, 53 Vict. ch. 33 (D.), all apply to a case of actual payment, *i.e.*, payment in due course, which means at or after maturity. It is pointed out by Wilde, C. J., in 4 Exch., at p. 12, "that till the time for payment arrives, the contract of the acceptor is unperformed and incapable of being performed, and the right to sue may be transferred with the property on the bill by any lawful owner of it." Here the notes were not payable till January 1st, 1895, and January 1st, 1896, and the Sawyer-Massey Company assigned on receiving their money on February 17th, 1894, before any action had accrued on the notes. A case more like the present, and going to affirm the equity of the plaintiff, is *Glasscock v. Balls* (1889), 24 Q. B. D. 13. Here, there has been no payment and no taking up of the notes by the person liable to pay, but merely a transfer for value received out of the land during its currency by the lawful holder.

The mortgagees have received no benefit from the notes, have made nothing out of them, and while they should be charged with the value, it is not a case for imposing interest.

Judgment.

Boyd, C.

Judgment for \$327.73 (the amount for which the Sawyer Company assigned), and costs below and of appeal.

By agreement at the hearing, this sum of \$327 is to be ratably divided among all the execution creditors (including Mrs. Nickerson).

FERGUSON, J. :—

George F. Ballagh was the owner of the farm mentioned and described in the pleadings, subject to large incumbrances. Each of the plaintiffs had recovered a judgment against the said George F. Ballagh, in or before the month of October, 1893, and duly placed their respective writs of execution against goods and lands in the hands of the proper sheriff to be executed. These writs of execution have been duly renewed from time to time, and are still in full force.

The defendants the Southern Loan & Savings Company, held a mortgage which was a charge upon these lands for \$700 and interest. This was registered on August 6th, 1892.

The defendant Agnes Jane Ramsdell, held a mortgage which was also a charge upon these lands, for the sum of \$1,500 and interest. This was registered on April 8th, 1891.

Amongst the incumbrances upon these lands, subsequent to the said mortgages, held respectively by the defendants as aforesaid, was an agreement for the sale of a threshing machine made between one John N. Taylor and one Robert W. Ballagh, of the one part, and the Sawyer-Massey Company, of the other part, for securing payment of the sum of \$425. This was a lien upon the said lands prior to the claims under the plaintiffs' writs of execution,

Judgment. and each of them, it having been registered on October
Ferguson, J. 10th, 1892.

In the transaction for the purchase of the threshing machine, Taylor and Robert W. Ballagh, gave to the Sawyer-Massey Company, these promissory notes, or documents that are called promissory notes, signed by them, two of which were each for \$142, and the other for \$141. These and the agreement constituting a lien upon these lands, as aforesaid, were for the purpose of securing payment of the same debt, namely, the price of the machine. One of these notes had been partly paid by the persons liable upon it, and the other two remained unpaid.

These defendants, as it appears, took proceedings jointly under the power of sale contained in their respective mortgages, and in such proceedings the lands were sold for the sum of \$4,660, a sum much larger than the sum required to satisfy their mortgages, and the purchase money was received by them as vendors.

There seems to be no complaint as to the distribution by these defendants amongst subsequent encumbrancers and chargees upon the land of the balance of this purchase money remaining in their hands after satisfying their own mortgages, and, as I understand, all of this balance, excepting a very small dribblet, was paid over in such distribution.

In this distribution the defendants paid to the Sawyer-Massey Company the amount unpaid upon the lien on the land held by that company, being a sum equal to the sum of the two unpaid promissory notes, what was unpaid on the other, and the interest and accumulations thereon, and thereupon by an indenture bearing date February 17th, 1894, the Sawyer-Massey Company assigned and transferred all their rights under the agreement and all other securities for all moneys payable under the same and all their powers and remedies in respect thereof to one Hattie E. Nickerson, who, it was said, was an execution creditor of the same George F. Ballagh, having her writs against goods and lands in the hands of the sheriff, but subsequent, in point of time, to

all the executions of the plaintiffs. It was said that this assignment was intended to be in trust for the execution creditors of George F. Ballagh, but upon its face it is absolute, and this is all that I know in this regard. Judgment.
Ferguson, J.

Hattie E. Nickerson and these defendants were represented by the same solicitor. The notes came into his hands and were held by him.

In the month of November, 1894, the defendants, through their solicitor, offered to assign and deliver the notes to the plaintiff in full of their claim. This offer was in reply to a claim made by the plaintiff and the offer was accepted by the plaintiff, but for some now unknown or undisclosed reason was not carried into effect, which seems unfortunate, for had this been done all further trouble would have been saved.

This charge upon the lands of George F. Ballagh, was plainly a security for the debt of Taylor and Robert W. Ballagh, and as shewn by the evidence of Taylor, the debt was his own debt for it was he who purchased and owned the machine for which it was incurred, and as before stated, the plaintiffs had their charges upon these lands, such charges being next subsequent to the claim and charge that the defendants paid off with the surplus of purchase money in their hands.

What the plaintiffs say and contend is that it was the duty of the defendants when they paid and satisfied the Sawyer-Massey Company their lien upon this land out of the purchase money thereof to get in the notes that were for the same debt and have these as a surplus of the proceeds of the sale for the benefit of the plaintiffs, who were encumbrancers next in order and priority, and to assign and deliver the notes to the plaintiffs to the end that the plaintiffs might realize upon them and apply the proceeds in satisfaction or on account of their judgments or rather their claims upon their executions against the lands.

If there had not been these executions or any executions against the lands, and George H. Ballagh was himself the

Judgment. claimant in respect of the surplus, it seems to me scarcely
Ferguson, J. open to doubt that he could properly and legally say to these defendants that when they paid the debt of Taylor to the Sawyer-Massey Company out of the proceeds of the sale of his land they were bound to get from that company for his benefit the other securities held for the same debt, and I do not see in the circumstances that exist, why these plaintiffs, as execution creditors, having their writs against the lands should occupy a less favourable position.

The contention that the notes became satisfied and discharged upon payment of the lien upon the land is not, I think, well founded. A note is, as I think, discharged by payment in due course by or on behalf of the person primarily liable upon it. This did not take place in the present case. The case *Glasscock v. Balls*, 24 Q. B. D. 13, seems to me to go far to shew that the notes in the present case were not discharged by the payment of the lien.

No question was raised as to whether, if the defendants should have transferred the note as contended by the plaintiffs, such transfer should have been to the sheriff or to the plaintiffs themselves.

So far, I am of the opinion that the contention of the plaintiffs is correct and should be given effect to.

The plaintiffs, however, further contend that if they had had the benefit of those notes when they were first demanded or asked for by them, the full amount of them could have been collected from Taylor the real debtor, but that Taylor has since become insolvent and pecuniarily worthless, and the value of the benefit that they should have had is entirely lost. The evidence of Taylor himself, I think, fully supports this contention in fact.

The plaintiffs claim large damages, but what they really contend for is the amount of the two unpaid notes and any balance unpaid on the other one, interest, etc.

I, however, agree in thinking that the amount paid the Sawyer-Massey Company, \$327.73, is reasonably the proper sum that the defendants should be ordered to pay to the plaintiffs, and I think there may be no interest on this.

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The appeal should, I think, be allowed, and there should ^{Judgment.} be judgment for the plaintiff, for \$327.73 with costs, but not ^{Ferguson, J.} interest. Such costs to include the costs of the action and of both appeals as well as the costs of the reference.

ROBERTSON, J.:—

The Master has found all the facts, which the plaintiff contends created the liability, although the Master has found there was no liability on the part of the defendants. Shortly stated the facts seem to be as follows: [The learned Judge here set out the facts and continued.]

Now, apart from the question as to whether the amount of the claim of the Sawyer-Massey Company could be considered as surplus of the sale money, I think there is no doubt that the notes in the hands of George F. Ballagh, who would be entitled to hold them against the maker, Taylor, were liable to be seized by the sheriff under the several executions in his hands belonging to the plaintiff and his co-execution creditors, under sec. 17 of R. S. O. (1887), ch. 64, the Execution Act, and, in that view of it, the plaintiff, I think, was entitled. In strictness these notes should have been handed over by the defendants to the sheriff, who could reseize upon them and apply the proceeds on the executions then in his hands, but that question is not raised before us, and I take it there is nothing on that score to prevent the plaintiff recovering. I think the evidence shews clearly that had these several notes or agreements been handed over to the sheriff, or to the plaintiff, at the time they came to the hands of the defendants, or to the hands of their solicitor which I think is the same thing, the amount due could have been collected from Taylor, but having improperly withheld them, and disposed of them otherwise, Taylor in the meantime has become financially worthless, and these execution creditors have, through the negligence or improper withholding of the notes, lost the benefit that otherwise would have accrued to them. I think, therefore, the appeal should be

Judgment. allowed, and judgment entered for the plaintiff for Robertson, J. \$327.73, the actual amount paid to the Sawyer-Massey Company. As regards allowing interest on this sum, my learned brothers have concluded that defendants should not be charged with such as for damages, etc. I am inclined to think that, although the defendants are to be treated as trustees, it is clear they were guilty of a breach of trust in the way they dealt with these notes, and for that reason, it would be only justice to charge them with the interest, but I do not feel strong enough on the point to dissent, and therefore, acquiesce, but the defendants should pay the full costs of the action, of the reference and of the appeals.

A. H. F. L.

[DIVISIONAL COURT.]

THE CANADIAN MUTUAL LOAN AND INVESTMENT CO.
v. NISBET.

Receiver—Life Policy—Security for Money—R.S.O. ch. 77, sec. 18.

The plaintiffs, judgment creditors, were held entitled to a receivership order in respect to the defendant's interest in a fully paid up life policy which he had assigned to the plaintiffs as security, reserving to himself the cash surrender value of the bonus additions.

A paid up policy is a "security for money" within R.S.O. ch. 77, sec. 18, "The Execution Act."

Statement. THE Canadian Mutual Loan and Investment Company were judgment creditors of the defendant Thomas W. Nisbet, under a judgment of April 1st, 1897, for \$7,094.76, recovered in respect of a mortgage. They also held as collateral security to the mortgage a fully paid up policy for \$5,000 upon the life of the said Thomas W. Nisbet in the Canada Life Assurance Company. This assignment while it assigned the insurance money, specially excepted the bonus additions which might be from time to time payable in respect of the policy; and upon application to the com-

pany as to when such dividends would be declared the Statement.
 secretary of the Life Insurance Company on March 12th, 1898, wrote as follows :—

“ I am in receipt of yours of the 11th inst., referring to policy 24684, Nisbet, and may inform you that the next dividend will be declared by this company December 31st, 1899, of which intimation will be given after the annual meeting of the company held in 1900. The last dividend was declared in 1895; this company declares but once in five years.”

On or about November 22nd, 1899, the plaintiffs applied *ex parte* to ROBERTSON, J., for, and obtained an interim order appointing them receivers to the extent of their claim of any bonus or dividend which might then be or might thereafter become due or accruing due from the Canada Life Assurance Company to Nisbet in respect to the policy which order was on December 19th, 1899, made permanent by FALCONBRIDGE, J.

The defendant Nisbet appealed, and the motion was argued on February 7th, 1900, before MEREDITH, C.J., ROSE, and MACMAHON, JJ.

J. H. Moss, for the defendant, contended that there was nothing to receive, and cited : *Holmes v. Millage*, [1893] 1 Q. B. 551; *Central Bank v. Ellis* (1896), 27 O. R. 583; *Bain v. Aetna Life Ins. Co.* (1890), 20 O. R. 6; *Pritchett v. English and Colonial Syndicate*, [1899] 2 Q. B. 429.

A. McLean Macdonell, for the plaintiffs, referred to : *Beamish v. Stephenson* (1886), 18 L. R. Ir. 319; *Webb v. Stanton* (1883), 11 Q. B. D., at p. 526; *Tyrrell v. Painton*, [1895] 1 Q. B. 202; *Weekes v. Frawley* (1893), 23 O. R., at p. 238; *Kirk v. Burgess* (1888), 15 O. R., at p. 610; *McLean v. Bruce* (1891), 14 P. R., at p. 202; *Bryant v. Bull* (1878), 10 Ch. D. 153.

The judgment of the Court was delivered on February 15th, 1900, by

Judgment. MEREDITH, C. J. :—

Meredith,
C.J.

The order appealed from may, I think, be supported without contravening anything which was decided in *Central Bank v. Ellis*, 27 O. R. 583, and the English authorities, which were followed in that case upon the short ground that the policy of insurance in respect of which the respondents desire the appointment of a receiver, would have been exigible in execution, as a "security for money" belonging to the defendant, under sec. 18 of the Execution Act, R. S. O. ch. 77, but for the assignment of it to the respondents as security for a debt due to them and the provision of the assignment entitling the defendant to receive from time to time the cash surrender value of the bonus additions to the policy, which if not so surrendered, according to its terms become payable when the policy "becomes a claim" by the death of the assured, and that these circumstances give the respondents the right to invoke the aid of the Court to enable them to reach the defendant's interest in the policy.

In *Weekes v. Frawley*, 23 O. R. 235, the Chancellor adopting the view of the Irish Courts in the cases of *Alleyne v. Darcy* (1855), 5 Ir. Ch. 56, and in *In re Sargent's Trusts* (1879), 7 L. R. (Ir.) 66, in preference to what is reported to have been decided by the Master of the Rolls in *Stokoe v. Cowan* (1861), 29 Beav. 637, came to the conclusion that a policy of insurance on the life of the judgment debtor on which premiums had yet to be paid for several years, was not exigible in execution under sec. 18 of the Execution Act.

It is unnecessary to consider whether that conclusion was a correct one, for, assuming it to have been, I am of opinion as I have said that the policy in question in this case would have been exigible in execution but for the circumstances to which I have referred. It is what is termed a "life ten payments policy," the assured paying ten annual payments; and the policy has become a paid up one, the ten payments stipulated for having been made.

The main, and indeed I think, the only reason, why such policies as were in question in *Weekes v. Frawley* and the two Irish cases were held not to be "securities for money" within the meaning of the Acts applicable, was that the machinery provided by them for realizing the securities dealt with by the Acts, was inapplicable to a policy on the life of the debtor on which premiums had yet to be paid. "How," it was said by the Lord Chancellor in *Alleyne v. Darcy*, 5 Ir. Ch., at p. 62, "is the sheriff to pay the premiums, or (not being entitled to sell), how can he in any way make it available;" but he added, "the provisions of the statute might perhaps be applicable to a policy due and payable at once; as to that case I shall say nothing; but this is one not to be payable for a considerable time, and I cannot think it to be within the meaning of the Act."

Judgment.
Meredith,
C.J.

The reason which suggested to the Lord Chancellor's mind this qualification, though not applying in terms to a paid up policy, seems to me to be equally applicable to such a policy, as to the one he had in mind, and I see nothing in the provisions of the Act which should lead to the conclusion that a paid up policy is not a "security for money," within the meaning of the Act. The sheriff is to retain the security for money which he seizes as security for the amount directed to be levied, and is authorized to sue in his own name for the sums secured by it when the time for payment has arrived.

Such a policy has become an unconditional obligation of the insured for the payment of the sum insured on the death of the insurer, and I can see no substantial difference between such an obligation and one by which another has become bound for the payment of a sum of money to the personal representatives of the judgment debtor on his death happening, or indeed at any other time not in any way dependent upon his death.

Upon the question as to whether apart from the context a policy of life insurance falls within the description "securities for money": *Lawrance v. Galsworthy* (1857),

Judgment. 3 Jur. N. S. 1049; *Bank of Montreal v. McTavish* (1867),
Meredith, 13 Gr. 395 (a fire policy), may be referred to.
C.J.

If I am right in this view, the respondents' case is brought within the rule stated by Lord Redesdale, at p. 148 of his work on Pleading (Mitford on Pleading, 5th ed.), which is referred to with approval in *Neate v. The Duke of Marlborough* (1838), 3 M. & Cr. 407, and *Harris v. Beauchamp*, [1894] 1 Q. B., at pp. 807, 808, and the respondents' right to obtain the benefit of the defendant's interest in the policy under ordinary process being defeated by a prior title—that of his assignee—not extending to the whole interest of the defendant in the property upon which the judgment is proposed to be executed, they are entitled to the aid of the Court to enable them to reach it.

The appeal must, therefore, be dismissed, but the costs of the motions and of the appeal ought not, I think, as a matter of course to be given to the respondents. It may be that nothing will be realized by the proceeding which has been taken because a reversionary dividend may not be declared or become payable, the insurance company, if it has the option to do it or not, may not be willing to accept a surrender of the reversionary dividend if one is declared, or the defendant may not elect to surrender it for a cash payment. The costs will therefore be reserved to be dealt with by a Judge in Chambers after it has been ascertained whether anything, and if so, what, has been realized as a result of these proceedings. If the result be that nothing, or but a trifling sum is realized, the respondents ought certainly not to get their costs, if, indeed, they ought not to pay the costs of the defendant.

A. H. F. L.

[DIVISIONAL COURT.]

LEES V. OTTAWA AND NEW YORK R. W. CO.

Railways—Tolls Not Fixed by Governor-General—Penalty—Right to Recover Back—51 Vict. ch. 29, sec. 227 (D.)—County Court Appeal—Setting Down—R.S.O. ch. 55, sec. 57—Cons. Rule 795.

The fact that a railway company has not had its tolls approved by the Governor-General under 51 Vict. ch. 29, sec. 227 (D.), does not in itself entitle a passenger who has paid such tolls to recover three times the amount under section 290, in the absence of evidence that the fares charged were unreasonable or excessive; nor is such passenger entitled to recover back the amount so paid by him as paid under a mistake of fact, where it was such as in equity and good conscience he ought to have paid.

Neither R.S.O. ch. 55, sec. 57, nor Con. Rule 795, prohibit a County Court appeal being set down to be heard for a sitting of the Divisional Court, commencing within thirty days from the decision complained of.

THIS was an appeal by the defendants from the judgment of the junior Judge of the County Court of the county of Carleton, in this action which was brought to recover money paid for railway fares, and damages, under the Railway Act, 51 Vict. ch. 29 (D.), under the circumstances stated in the judgment. Statement.

The appeal was argued on February 5th, 1900, before MEREDITH, C. J., ROSE, and MACMAHON, JJ.

Curle, for the defendants, contended that 51 Vict. ch. 29, sec. 227 (D.), did not take away the common law right of a carrier to charge for services, but only regulated the right to collect them by action, or enforcement of lien; that the payments were voluntary, and made with knowledge of the circumstances, and the plaintiff must be deemed to have acquiesced in the charges made: *Killmer v. New York Central R. R. Co.* (1885), 100 N.Y. 395; *Bilbie v. Lumley* (1802), 2 East 469; that the money was equitably due, and could not be recovered back: *Bize v. Dickason* (1786), 1 T. R. 285; *Farmer v. Arundel* (1772), 2 Wm. Bl. 824; and that there was no evidence that the charges were unjust or extortionate within section 290.

Statement. The plaintiff, in person, contended that the defendants had no right except under the statute, and therefore, no right to levy the tolls here; that in the public interest railways should be held strictly to the law in these respects; that the common law right was taken away by the statute; that anyone injured by contravention of section 227, was protected by section 290; that rights here being statutory, the cases on the common law right to recover back money paid did not apply, and that the fares here were paid in ignorance of the fact on which he now relied.

The judgment of the Court was delivered on February 19th, 1900, by

MEREDITH, C. J.:—

This is an appeal by the defendant from the judgment after trial of the action, of the junior Judge of the County Court of the county of Carleton, in favour of the plaintiff.

The defendant company operates a line of railway from Ottawa to Cornwall and its by-law fixing the tolls to be demanded and taken for passengers and goods transported upon the railway was not approved by the Governor in Council pursuant to the provisions of the Railway Act, 51 Vict. ch. 29 (D.), until October 24th, 1899.

The plaintiff from July 30th, 1898, to May 20th, 1899, was a passenger on the railway, most of his journeys being between Ottawa and Russell; and the fares paid by him during that period amounted to \$49.95.

Down to early in March, 1899, the second class fare between the points named, a distance of 20 $\frac{1}{10}$ miles, was 50 cents for a "single" passage, and the first class 70 cents for a single, and \$1.20 for a return passage; but after that date the second class rate was discontinued. The plaintiff never paid more than 50 cents for a single or \$1.20 for a return passage, except on two occasions, the 6th and 13th of May, 1899, when he paid 70 cents for a single passage. All these fares were paid without objection, except

on one occasion (May 6th, 1899), when, having offered the conductor, in payment of his fare, 50 cents, the plaintiff was informed that that rate was withdrawn and that he would have to pay 70 cents, which he did.

Judgment.

Meredith,
C.J.

The plaintiff had on March 10th written to the company's general passenger agent stating that he had been paying the second class fare of 50 cents each way, that he considered that his regular patronage of the road entitled him to a better rate, but that instead of getting one the company had abolished the second class rate and obliged him to pay \$1.20 for a return ticket, and asking to be granted a family commutation ticket, the rate suggested for it being 30 cents a trip, or a reduced rate, and pointing out certain advantages that would accrue to the company if it complied with his request.

The company on April 13th, 1899, informed the plaintiff by letter of that date that it would not comply with his request, and on the following day he wrote to the Department of Railways and Canals for information as to whether the company's by-law fixing the tolls had been approved by the Governor in Council, and having on the 17th of the same month received a reply in the negative, he, on the following day, wrote to the company's general manager telling him of this, demanding payment of \$45.75, the amount paid by him for fares, and three times that amount in addition, which he claimed to be entitled to under section 290 of the Railway Act, and notifying the company that unless the claim was paid within five days he would take legal proceedings to recover it. The company not having complied with this demand, the action was brought, and by the judgment appealed from the plaintiff has recovered against the defendants \$49.55 for the fares paid and \$148.65 for the "penalty" under the statute, with costs, and from that judgment the present appeal is brought.

Some testimony was given at the trial for the purpose of shewing that the rates charged to the plaintiff were excessive, but there is no finding by the learned Judge as to this, and a finding in favour of the plaintiff would not

Judgment. have been warranted by the evidence. The judgment
Meredith, must, therefore, be supported, if at all, solely on the want
C.J. of a by-law fixing the tolls approved by the Governor General and notified in the *Canada Gazette* according to the requirements of section 227 of the Act, and upon the provisions of section 290.

It was argued for the respondent that the fares were paid under a mistake of fact, and that he was, therefore, entitled to recover them as money had and received by the company to his use.

I am by no means satisfied that the fares were paid under a mistake of fact, but assuming them to have been, the respondent is not entitled to recover them as money had and received, because, though the law would possibly not have compelled him to pay them, what he paid was but a just compensation for the services which the company performed for him in consideration of it, and therefore, "in equity and conscience," ought to have been paid by him.

It is well settled law and so long ago as the year 1786 it was stated by Lord Mansfield to have always been the rule, "that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received": *Bize v. Dickason*, 1 T. R., at p. 286.

It is, in the view I have taken, unnecessary to decide what the effect of section 227 is. Prior to the Act of 1888 (51 Vict. ch. 29), the corresponding section of the Act then in force did not contain the words "nor shall any company levy or collect any money for services as a common carrier except subject to the provisions of this Act." These words were added because it was taken to be the law, as stated by Mr. Justice Morrison, in delivering the judgment of the Court in *Scott v. Midland R. W. Co.* (1873), 33 U. C. R., at p. 595, that where a company had not submitted its tolls for the sanction of the Governor General in Council, it might, nevertheless, collect for

services rendered as a common carrier, and it was thought that companies should not be allowed to evade the principle of the law by simply withholding their tariff and then charging excessive rates as common carriers (House of Commons Debates, 1888, p. 1430) and therefore, the words I have quoted were added to the section.

Judgment.

**Meredith,
C.J.**

It may be open to question whether the words which were added do more than apply the provisions of the Act as to the manner in which the tolls are to be regulated to the charges for services as common carriers, and the difference in the language of the two branches of the section lends colour to the view that that was the intention of the Legislature. I refer to the point because the effect of the section was discussed in argument, but it is, as I have said, unnecessary to express any opinion upon it.

It is plain, I think, that the theory upon which the action to recover back the moneys paid by the respondent was brought cannot be supported. To give effect to it would be to hold that a company whose tariff has not been sanctioned by the Governor General must not carry on its business and is not at liberty even to make special contracts with persons who may be desirous of using the railway for the purpose of travel or for the carriage of goods, for the service which is desired, and that if it does so, though the service is performed and the charge made for it, which has been paid, is a reasonable one, the person who has got the benefit of it may recover back what he has paid, and for such a proposition I can find no warrant in the provisions of the Act.

There remains the question whether the respondent is entitled to recover under section 290, and I think that he is not. Having come to the conclusion that there is nothing to shew that the fares charged were unreasonable or excessive, it must follow that they are neither unjust nor extortionate. The language of the section is entirely opposed to the idea that it was intended to apply to such a case as that in question here, even if it be assumed that the company had no right to collect the fares from persons

Judgment.
Meredith,
C.J.

willing to pay them. It would certainly be an anomaly to speak of the receipt of a sum which ought in equity and conscience to have been paid, though its payment could not be compelled, as an unjust or extortionate exaction, or the sum paid as one unjustly exacted.

In my opinion the plaintiff's case entirely failed and his action should have been dismissed.

The appeal must therefore be allowed with costs, and the judgment entered in the Court below set aside and in lieu thereof judgment be entered dismissing the action with costs.

Two objections were made by the respondent to the competency of the appeal, *i.e.*, that the original pleadings were not certified but only copies of them, and that the appeal was set down for too early a date, having been set down for a sittings of the Divisional Court which commenced within thirty days from the decision complained of, although section 57 of the County Courts Act and Con. Rule 795, provide that it shall be set down for the first sittings which commence after the thirty days.

We do not think that either objection is entitled to prevail.

It is the Rule and not the statute which requires the original pleadings to be certified, and it is clear that we may dispense with what the Rules require to be done, or permit it to be done *nunc pro tunc*.

The provision of the statute and Rule as to setting down was designed to prevent the appeal being unduly delayed, and is to be read as providing that the setting down is to be not later than for the first sittings which commences after the expiration of thirty days from the decision complained of.

A. H. F. L.

KING ET AL. V. ROGERS ET AL.

Limitation of Actions—Acknowledgment in Writing—Revival of Liability—Agent of Executor—Letter to Third Person—Admissibility.

The executor of the will of one of the joint makers of a promissory note proved the will after the debt on the note as against the testator or his estate had become barred by the Statute of Limitations. The will directed that all the testator's just debts should be paid by his executors as soon as possible after his death. The executor, who lived out of Ontario, executed a power of attorney to the other joint maker of the note, who was primarily liable on it, and against whom it had been kept alive by payments, to enable him in Ontario "to do all things which might be legally requisite for the due proving and carrying out of the provisions" of the will—the executor having at this time no knowledge of the note:—

Held, that a letter written by the surviving maker shortly after the execution of the power of attorney, even if in its terms sufficient, was not such an acknowledgment, within R. S. O. ch. 146, sec. 1, as would revive the liability; for there was no trust created by the will for the payment of debts, nor was there any legal obligation on the part of the executor to pay statute-barred debts, and the surviving maker was not an agent "duly authorized" to exercise the discretion which an executor has to pay such debts.

Three years later the executor wrote to the holder of the note to the effect that the holder ought to look to the surviving maker for payment, as he was now doing well:—

Held, that this was not such a recognition as amounted to a promise or undertaking to pay.

Just before this action was brought, the executor wrote to the plaintiffs' solicitors asking them not to take any further step till he could hear from the surviving maker; and to the latter he wrote: "The debt is owing, and they are anxious to get their estate settled up:—"

Held, insufficient as an acknowledgment, and that the letter to a third person—not the creditor—was not admissible.

Goodman v. Boyes (1890), 17 A. R. 528, followed.

ACTION by William C. King and Charles A. Windatt, Statement.
executors of the last will of Abraham Younie, deceased,
against Charles Rogers, personally, and against William H.
Elford, as executor of the last will of William Elford,
deceased, to recover the sum of \$1,517.92, alleged to be
due upon a promissory note dated the 1st April, 1884,
made by the defendant Rogers and William Elford,
deceased, in favour of Abraham Younie, deceased, for
\$1,000, payable nine months after the date thereof, with
interest at the rate of eight per cent. per annum.

The action was begun on the 28th November, 1899.

The statement of claim alleged that the defendant Rogers and William Elford, deceased, had made certain specified payments on the note, at different times up to January, 1896.

Statement. The defendant Rogers did not defend the action.

The defendant William H. Elford denied that either he or his testator had ever made any payment on account of the note, and set up the Statute of Limitations.

The plaintiffs replied that the late William Elford by his will directed payment of his debts, and the defendant William H. Elford, who resided in Manitoba, constituted and appointed the defendant Rogers his attorney and agent for the purpose of proving and carrying out the provisions of the will, and ever since the death of William Elford the defendant Rogers had acted as such attorney and agent and in the place and stead of the defendant William H. Elford in all matters relating to the winding-up of the estate of William Elford, deceased; that William Elford in his lifetime paid to Abraham Younie the following sums on account of the note, viz., \$25 on the 3rd July, 1894, \$75 on the 9th August, 1894, and \$45 on the 31st July, 1895, and the defendant William H. Elford, by his attorney and agent, the defendant Rogers, after the death of William Elford, and on the 21st January, 1896, paid to Abraham Younie \$25 on account of the note; and that the defendant William H. Elford acknowledged his liability as executor and the liability of the estate of William Elford on the note by a writing under the hand of his attorney and agent, the defendant Rogers, dated 7th November, 1896; and in or about the year 1898 the defendant William H. Elford further acknowledged his liability as executor and the liability of the estate in the note by a letter written to the plaintiff King.

The action was tried before BOYD, C., without a jury, at Toronto, on the 9th April, 1900.

The facts are stated in the judgment.

D. E. Thomson, Q. C., and W. N. Tilley, for the plaintiffs.

F. E. Hodgins, for the defendant Elford.

The defendant Rogers was not represented.

BOYD, C., at the conclusion of the hearing, ruled that the note had not been kept alive by payments as against the Elford estate, and reserved judgment as to other points.

Judgment.
Boyd, C.

April 17, 1900. BOYD, C.:—

As against the executor defendant the note is outlawed unless the papers relied on form a sufficient acknowledgment under the statute R. S. O. ch. 146, sec. 1. The cases have defined clearly enough what is requisite in order to revive the liability after the expiry of six years. One of three things must be proved: (1) A distinct acknowledgment of the debt; (2) a distinct promise to pay the debt; or (3) a conditional promise as to which the condition has happened. The present case falls under the first head, of acknowledgment. That is to say, can there be found under the hand of the defendant or his duly authorized agent an absolute unconditional acknowledgment that the sum is due, from which a promise to pay is to be fairly implied? The difficulty arises as to the application of the judicial canons to the particular writings—complicated by decisions varying according to the amount of favour or disfavour with which the defence of the Statute of Limitations is regarded by the particular Judge.

Passing to the circumstances of this case, it appears that the will of William Elford directs all his just debts to be paid by his executors as soon as possible after his death. Of the two executors only one, the defendant, proved the will, and at that time the claim on this note was barred by the statute. I infer that the will was proved in Manitoba, where the executor lived, before proof was had in Ontario.* In February, 1896, the sole executor, living at Carman, Manitoba, executed a power of attorney to his

*William Elford died on the 20th October, 1895, and probate of his will was granted to the defendant William H. Elford on the 10th February, 1896.

Judgment. brother-in-law, the defendant Rogers, who was primarily
Boyd, C. liable on the note, and against whom it was kept alive by payments. This was to enable Rogers in Ontario "to do all things which might be legally requisite and necessary for the due proving and carrying out of the provisions" of the Elford will.

The defendant Elford had at this time no knowledge of the note sued on, and was not made aware of it till January, 1897, when he paid a visit to Ontario. In November, 1896, the plaintiff, believing Rogers to be an executor of the Elford estate, wrote him about the note and received an answer in these words: "In reference to Mr. Younie's estate. I don't think I will be able to do anything till December next. We expect to get the Elford estate settled up then—the executor is coming home before Christmas; then we will settle up all business."

Now there was no trust created by the will for the payment of debts, nor was there any *legal* obligation on the part of the executor to pay statute-barred debts, though he might exercise his discretion to do so: *Midgley v. Midgley*, [1893] 3 Ch. 282. I do not think this discretionary function was, in the circumstances, transferred to the attorney so as to authorize him to acknowledge it, particularly as the executor was himself in ignorance of any such claim. This agent was not "duly authorized" within the meaning of the statute, and the dealing with this outlawed note was not "*legally* requisite or necessary for carrying out the will," within the meaning of the power of attorney.

But assume that Rogers was so authorized; I should not be disposed to find any acknowledgment of debt made by the executor. The letter is ambiguous, and there is no evidence to clear the ambiguity. Who is meant by "we expect"? It may be the writer and his wife, who was to get something out of the Elford estate. "The executor coming home" is spoken of rather in apposition to the writer. The "settling up of all business" relates rather to the "settling up of the Elford estate" than to

the paying of the note, alluding to which the writer says, "I will not be able to do anything till December next:" *Smith v. Thorne* (1852), 18 Q. B. 134. Judgment.
Boyd, C.

The next matter to be considered is that the plaintiff writes to Elford about the note in April, 1899, and the defendant's answer is said to be in substance (the letter being lost) that "he thinks King ought to look to Rogers for payment, as he understands Rogers is now doing well." But the implication I should draw from that is that the defendant thinks that he ought not to be looked to for payment. There is, no doubt, some recognition of the debt, but that is not enough—there must be such a recognition as amounts to a promise or undertaking to pay it: *Re Hindmarsh* (1860), 1 Dr. & Sm. at p. 133. See also *Holland v. Clark* (1841), 1 Y. & Coll. C. C. 151; *Green v. Humphreys* (1884), 26 Ch. D. at p. 480; *Poynder v. Bluck* (1837), 5 Dowl. 570; *Rackham v. Marriott* (1857), 2 H. & N. 196.

The last correspondence passes between the plaintiffs' solicitors and the executor defendant and between the co-defendants. In answer to the solicitors' letter before action, Elford writes on 31st August, 1899: "I would ask you not to take any further step till I can hear from Charles Rogers, to whom I have written concerning the matter." That by itself appears to amount to nothing except a request that the matter of litigation stand in abeyance for a season: *Jupp v. Powell* (1884), Ca. & Ell. 349, affirmed on appeal.

Nor do I think that this can be eked out by seeking to incorporate with it the contemporaneous letter to Rogers. In that Elford says to Rogers: "The debt is owing, and they are anxious to get their estate settled up." But the whole context shews that this is an argument for Rogers to pay a just claim, yet no admission that the Elford estate is also liable. However, in point of law this letter to a third person—not the creditor—is not admissible. The contrary view, which was advocated in *Roblin v. McMahon* (1889), 18 O. R. 219, 224, now stands against the weight

Judgment. of authority, which is so far as I am concerned conclusive :
Boyd, C. *Goodman v. Boyes* (1890), 17 A. R. 528. The latest case is *Stamford, etc., Banking Co. v. Smith*, [1892] 1 Q. B. 765, in which Lord Herschell says there is now no question that a payment or acknowledgment must be made to the creditor or his agent.

Fisk v. Mitchell (1871), 24 L.T.N.S. 272 and 19 W. R. 793, was much relied on by the plaintiffs. But that language goes much beyond what is found here. There was a distinct acknowledgment that the note was due, and that the writer considered himself ultimately liable upon it. The case is meagrely reported, and it does not appear whether the letter was written before or after the statute had barred the claim.

Here the note had become statute-barred before the death of the testator, and the executor had had no personal knowledge of the matter, so that, in my opinion, very distinct evidence should be given of such an acknowledgment as would indicate that liability therefor still existed against the executor. This is a case in which, if the result is "equivocal, vague, or indeterminate," the decision should go rather in favour of than against the defendant executor: see *per* Story, J., in *Bell v. Morrison* (1828), 1 Pet. S. C. at p. 362.

The conclusion is thus reached that no sufficient acknowledgment or promise is proved to avoid the effect of the Statute of Limitations.

The question as to payments by the testator I disposed of at the hearing, so that now I have to dismiss the action as to Elford with costs.

E. B. B.

[DIVISIONAL COURT.]

IANSON V. CLYDE ET AL.

Executors and Administrators—Judgment against Executors—Endorsement of Note by Executors “Without Recourse”—Devolution of Estates Act—Caution after Twelve Months—Effect of.

A judgment against executors of an estate is only *prima facie* evidence of its being for a debt due by the testator as regards the parties interested in his real estate who are at liberty to disprove it.

In an action for administration by a judgment creditor on a judgment recovered on a note discounted by him, which note was received by executors for the sale of personal property of the testator and endorsed “without recourse” to the plaintiff:—

Held, that the endorsement of the note by the executors did not make it a debt of the testator in the hands of the endorsee.

Held, also, that the effect of the Devolution of Estates Act and amendments acted upon by the registration of a caution under an order of a County Judge after the twelve months has expired is to place lands of a testator again under the power of his executors so that they can sell them to satisfy debts, and that the expression “in the hands” of executors as applied to property of the testator is satisfied if it is under their control or saleable at their instance, and that the operation of a devise of lands is by the Act only postponed for the purposes of administration, and that the estate does not pass through the medium of the executors but by the operation of the devise.

THIS was an action for the administration of the Statement.
estate of one Thomas Clyde, founded on a judgment against his executors. The following statement of facts is taken from the judgment of the Judge at the trial:—

The action, which was commenced on the 4th November, 1898, is against Jane Clyde (the widow), Hannah Clyde, Jane Hodson (formerly Jane Clyde), William Clyde and John Clyde, the heirs and devisees of the real estate of the late Thomas Clyde deceased, and Thomas Allin and John Clyde, the executors of the last will and testament of the said Thomas Clyde.

Thomas Clyde died on the 4th January, 1894, and probate was granted to the executors on the 12th March, 1894.

The alleged claim of the plaintiff against the estate of Thomas Clyde is founded as follows:

At the time of Thomas Clyde's death, the plaintiff held his note for \$200, which was then due and unpaid.

The executors having sold the personal property of the testator by auction, William Clyde, a son of the testator,

Statement. and one of the devisees under his will, became the purchaser to the extent of \$262.45 for which he gave his promissory note, payable twelve months after date "to the order of Thomas Allin and John Clyde, executors estate late Thos. Clyde, with interest."

This note they endorsed "without recourse to us" and discounted, together with a number of other notes received by them from purchasers at the said sale, with the plaintiff, on getting from him the promissory note made by the testator, which he then held, the plaintiff paying to the executors the difference between the amount of the testator's note and the notes so discounted.

At the time William Clyde made the note in question, he was regarded as being perfectly good for the amount.

The note not having been paid, the plaintiff brought an action thereon against the maker and the endorers Thomas Allin and John Clyde, the executors. William Clyde did not defend, and judgment went against him by default. The trial of the action against the executors took place on the 10th December, 1895, before Judge Burnham, senior Judge of the County of Ontario.

In their defence to that action, they set up that they endorsed the note sued on "without recourse to them or either of them and upon the distinct understanding and agreement with the plaintiff that he would look solely to the defendant William Clyde for payment thereof and would not in any way claim that they were liable to him, neither (*sic*) the estate of Thomas Clyde for the payment of the said note."

The learned county court Judge, however, having regard to the language of sub-sec. 5 of sec. 31 of the Bills of Exchange Act of 1890, directed that judgment be entered for the plaintiff against Allin and John Clyde in their capacity as executors, so as to charge the estate they represented.

This was on motion to set aside such finding and order, affirmed on the 3rd March, 1898, and final judgment entered on the 31st May following.

The plaintiff in this action alleges in his statement of **Statement.** claim, that all of the estate of the said Thomas Clyde deceased, other than the lands mentioned in his will, have been exhausted by the said defendant's executors in the payment of debts, and that the said lands now constitute the whole of the estate of the said Thomas Clyde deceased.

The plaintiff's prayer is, that the defendants or some of them may be ordered to pay the plaintiff's claim and all costs; that in default of payment the estate of the said late Thomas Clyde may be administered under the direction of the Court; and that a declaration may be made that the whole of the lands which were of the estate of the said Thomas Clyde at the time of his death are subject to and are assets available for the payment of the plaintiff's claim and costs.

The action was tried at Whitby on the 11th April, 1899, before MACMAHON, J., without a jury.

N. F. Patterson, Q.C., and F. N. Raines, for the plaintiff.
Clute, Q.C., and S. M. Yarnold, for the defendants other than the executors.

C. J. Holman, for Thomas Allin, an executor.

D. Ormiston, for John Clyde, the other executor.

The following cases were cited and references made: *Ruthven v. Ruthven* (1878), 25 Gr. 534; *Whitaker v. Tatham* (1831), 7 Bing. 628; *Saunders v. Breakie* (1884), 5 O. R. 603; Bigelow on Estoppel, 5th ed., p. 147 & *Garnett v. Macon* (1825), 6 Call. (Va.) 308 in note; *Freed v. Orr* (1881), 6 A. R. 690; Am. & Eng. Ency. of Law, vol. 7, p. 299; *Re McMillan, McMillan v. McMillan* (1893), 24 O. R. 181; *Ramus v. Dow* (1893), 15 P. R. 219; *Tenute v. Walsh* (1893), 24 O. R. 309; Bills of Exchange Act, 1890, sec. 26.

July 8th, 1899. MACMAHON, J. :—

The plaintiff's judgment is only *prima facie* evidence of its being for a debt due by the testator. In *Lovell v.*

Judgment. *Gibson* (1872), 19 Gr. 281, Mowat, V.-C., held that for the purposes of an execution against lands, heirs are *primâ facie* bound by a judgment against the executor or administrator of their ancestor, in the same way as next of kin are bound; and, although they are not entitled as of course to have the issues tried over again, still it is open to them to shew, not only fraud and collusion, but that the judgment or decree, though proper against the executor or administrator, was in respect of a matter for which the heirs were not liable.

**MacMahon,
J.**

Strong, V.-C., would have held, in *Willis v. Willis* (1872), 19 Gr. 573,—but for the judgment of Mowat, V.-C., in *Lovell v. Gibson*,—that a judgment against executors was not even *primâ facie* evidence against the heirs.

Harvey v. Wilde (1872), L. R. 14 Eq. 438, was a creditor's suit for the administration of the real and personal estate of a testator, and a judgment recovered against the executors (who were also trustees of the real estate), was held to be *primâ facie* evidence of a debt against the persons interested in the real estate; but they were to be at liberty to adduce rebutting evidence. Lord Romilly, M. R., in that case, at p. 440, said: "I do not think I can hold the devisees bound by the judgment; but on a claim made in a suit such as this I think I have jurisdiction to decide on which side the burden of proof lies. When a creditor brings in a claim I frequently order an action to be brought in order to decide the matter; and if, after the action has been tried and decided against the executor, it were necessary to have it tried over again against the devisees of the real estate, the delay would be endless. I think, therefore, that the judgment ought to be *primâ facie* evidence of the debt. The devisees will be at liberty to disprove it, if they can; but if they do not, I shall hold the debt binding against the real estate."

In 1881, our Court of Appeal decided the point in the same way in *Freed v. Orr et al.*, 6 A. R. 690, where the present Chief Justice in delivering the judgment of the Court, at p. 702, said: "The statutes make the land

liable to be sold only for a debt of the testator or intestate ; and whatever may be the effect of the judgment, a sale of the testator's lands under it cannot be upheld, if in point of fact it was not recovered in respect of a debt of the testator." Judgment.
MacMahon,
J.

The executors being the holders of a number of promissory notes received by them from the different purchasers of the personal estate of the testator which had been sold on credit, discounted such notes, amounting to \$424.20 (which included the said note made by William Clyde for \$262.45) with the plaintiff, who, as part of the consideration for the notes so discounted, delivered to them the promissory note for \$200 made by the testator, which he then held, which with the interest thereon amounted to \$204.42. The debt due by the testator to him was thus satisfied and discharged.

The endorsing by the executors of a promissory note received by them and payable to their order, would not make it a debt of the testator in the hands of the endorsee, and therefore the judgment in the county court was not recovered in respect of a debt due by the testator, and consequently was not binding on the real representatives of his estate.

There will be judgment for the defendants dismissing the action with costs.

From this judgment the plaintiff appealed and the appeal was argued on January 29th, 1900, before a Divisional Court composed of BOYD, C., and ROBERTSON, J.

Aylesworth, Q. C., and S. H. Bradford, for the appeal, contended that the plaintiff's money was used by the executors to pay the debts of the estate ; that he had the obligation of the testator in his lifetime to pay, and so his estate was liable ; that while the evidence of the debt may have been given up, the obligation to pay still remained ; that the endorsement by the executors "without recourse" only applied to save them from any personal liability, and

Argument. that it was their intention to leave the estate still liable, and in the county court action the County Judge so held on the evidence; that the caution which had lately been registered by the executors revested the land in them and so made it liable even in the hands of the heirs, who take title from the executors under the Devolution of Estates Act, and referred to *Willis v. Willis* (1872), 19 Gr. 573; *Harvey v. Wilde* (1872), L. R. 14 Eq. 438; *Freed v. Orr* (1881), 6 A. R. 690; *In re Martin* (1895), 26 O. R., at p. 466; *Farhall v. Farhall* (1871), L. R. 7 Ch. 123, at p. 128.

Clute, Q. C., and *Yarnold*, contra, contended that the judgment was not for a debt of the testator and must stand or fall on the evidence given: that the new note was not given in place of the old note, but was purchased by the plaintiff from the executors and referred to Bigelow on Estoppel, 3rd ed., 198, and relied upon the cases cited below and referred to in the judgment of the Judge at the trial.

Ormiston, for John Clyde, an executor. There can be no subrogation here as there were other notes transferred, and the testator's note is paid.

Slaght, for Thomas Allin, the other executor, contended that the executors were unwillingly forced into this litigation without having any beneficial interest, and submitted their rights to the protection of the Court.

Aylesworth, in reply. The devisees take through the executors, and the lands in their hands are bound by the judgment. The registration of the caution after the twelve months binds the property: *Lovell v. Gibson* (1872), 19 Gr. 280; *Willis v. Willis* (1872), 19 Gr. 573; *Williams on Executors*, 9th ed., p. 1661; *Harvey v. Wilde* (1872), L. R. 14 Eq. 438; *Walker's Compendium of the Law of Executors*, p. 135; *In re Martin* (1895), 26 O. R. 465.

February 10th, 1900. BOYD, C. :—

By R. S. O. 1887 ch. 108, sec. 4, real estate is made to devolve on the legal personal representatives and to be administered by them as if it were personal property: section 9.

Judgment.
Boyd, C.

By the Act of 1891, 54 Vict. ch. 18, sec. 1 (O.), real estate not disposed of by the executors within twelve months after the death shall then be deemed to be vested in the devisees or heirs beneficially entitled thereto, without any conveyance by the executors—unless a caution is registered—(*i.e.*, during the year).

In this case the will was made in 1891, and the testator died in 1894, after the passing of the last mentioned Act.

No caution was registered or provided by the Act of 1891, and as a consequence the real property became vested in the beneficiaries under the will of Thomas Clyde.

The action against the executors in the county court began in February, 1896, and judgment was obtained on 31st May, 1898, for \$269.67 against the property of the testator in the hands of the executors. That judgment did not attach upon this land which was then at home under the testamentary devise (or if there was intestacy as to some acres, then as to those acres, in the heirs).

The Act of 1893, 56 Vict. ch. 20 (O.), provides for the registration of a caution after the expiry of the twelve months in certain cases among which is upon the procurement of an order so to do from the county court Judge. Such an order was obtained *ex parte* by the executors, and a caution registered on the 24th October, 1898. By sec. 2 of the Act of 1893, such caution shall have the same effect as one registered within twelve months, save as regards persons who have acquired valuable rights, etc.

The effect of this legislation acted upon by registering a caution under the sanction of the county Judge appears to place the lands again under the power of the executors, so that they can sell them to satisfy debts. The county court judgment is against the property of the deceased in the hands of the executors, and though this property was not in their hands at the date of the judgment, it became so practically when the caution was subsequently registered. "In the hands" is of course a metaphorical expression, and it is

Judgment. satisfied if the land is under their control or saleable at their instance: *In re Martin* (1895), 26 O. R. 465.
Boyd, C.

But the judgment creditor in the county court has begun his action in the High Court for administration of the land to satisfy his claim, making the heirs and devisees co-defendants with the executors.

A defence is raised impeaching the judgment and setting up that the claim of the plaintiff does not run against the estate of the testator.

The evidence given as against the exemplification of the county court judgment is sufficient to shew that the note, originally held by the plaintiff against the testator, was satisfied by the transaction with the executors whereby the note taken up by them was discharged. This is the conclusion on the facts of the trial judge and I agree with it.

Now, the appeal is taken on the ground that the county court judgment is conclusive on the heirs and devisees, and that the cases cited below were all superseded by the effect of the Devolution of Estates Act. This legislation has no such effect in my opinion. Lands were assets for the payment of debts in this Province long before that late Act was passed. The effect arrived at by the statute was rather to simplify and unify the procedure for the purposes of administration outside of the courts, than to change the practice in litigated matters. The decision of the Court of Chancery on rehearing in *Eccles v. Lowry* (1876), 23 Gr. 167, seems applicable to the present situation. Proudfoot, V.-C., says: "We have had an established course of practice that lands always have been, and always may be, rightfully sold under a judgment against the personal representative.

"The executor represents the estate of the deceased. It is his duty to protect it from demands that may be made upon it, and when judgment is recovered against him the lands may be sold under it. It is true the estate descends to the heir or devisee. The judgment is, as against the estate, conclusive evidence of the existence of the debt; and it

might well have been held conclusive against all the persons whose property might be reached under that judgment, whether next of kin or heirs-at-law. And it is so at law. In this Court, however, our general order 472, which only expresses what had before been the practice, requires notice to be given to the heirs and devisees, or one or more of them, before accounts or enquiries are directed in regard to real estate. This does not expressly declare the effect to be given to accounts taken in their absence, but it does not declare they shall have no effect, and it only requires notice to be given to *one* or *more* of them. Here the administrator is one of the heirs at law, and even according to a rigid construction of the order it has been complied with.

"No injustice has been done to the heirs by ascribing to the judgment the limited effect of being only *prima facie* evidence:" pp. 172, 173.

It is also to be observed that even under the Devolution of Estates Act the operation of the devise is only postponed for purposes of administration, and the estate does not pass through the medium of the executor but by the operation of the devise, whereas the title to personal estate comes through the executor to the beneficiaries.

This plaintiff coming into equity asks administration. He must by the Con. Rules (951 & 952) make, and he has made, the owners of the land parties. Then the heirs and devisees are not conclusively bound by the proceedings *ex parte* as to them, and may shew grounds and reasons why the judgment ought not to be entered as against them. This they have succeeded in doing, and the proper result of the evidence is, that the action for administration should be dismissed with costs.

Costs of appeal follow the result as to the heirs and devisees, but as to the executors no costs of appeal should be given, as their action and inaction have brought about the difficulty—inasmuch as they should have appealed from the county court Judge and they should have abstained from applying *ex parte* for a caution.

Judgment.

Boyd, C.

Judgment.**Boyd, C.**

We do not interfere with the discretion of the trial Judge in giving costs to the executors.

I feel less scruple in coming to this conclusion because the result in the county court appears to me, as at present advised, to be totally erroneous.

The sale note there sued on was given by a purchaser to the executors and endorsed by them to the plaintiff "without recourse." The Judge below received evidence to shew, and found that the estate was to be answerable for the amount of the note, though there was no personal liability incurred by the executors by virtue of the qualified endorsement. This result was against the weight of evidence—it was contrary to law to receive oral testimony to add to or explain the written instrument sued upon, and it was against authority to hold that "without recourse" had the peculiar meaning of exempting the executors but not the estate. As put by Buller, J., in *King v. Thorn* (1786), 1 T. R., at p. 489, touching the endorsement of executors: "If they endorse (the bill) they are liable personally, and not as executors, for the indorsement could not give an action against the effects of the testator." This is cited with approval in *Aspinall v. Wake* (1833), 10 Bing. 55. The Bills of Exchange Act, 1890, does not affect this position.

ROBERTSON, J. :—

In my judgment there was no necessity for bringing this action.

The plaintiff had recovered a judgment in the county court for the amount of his claim, and had, by virtue thereof, the right to sell the lands of the testator, in the hands, metaphorically speaking, of the executors.

This has always been the procedure in this Province, and the "Devolution of Estates Act," has not, in my judgment, in any way interfered with the rights of parties interested either in the debt or in the lands of which the debtor died seized; but taking such a course would not

prevent the devisees of the land, or the heirs-at-law from shewing that the judgment debt was one which should not be enforced against the lands devised to or inherited by them; the only difference would be in the procedure. Judgment.
Robertson, J.

If the lands were seized under an execution on that judgment and offered for sale, the devisees or heirs could restrain by injunction the sale, but in order to do so they would have to shew that the debt for which the judgment had been recovered was not one due by the estate and while that judgment would afford *prima facie* evidence to the contrary, it would, nevertheless, be open to the devisees or heirs to prove that it was not in fact or in truth a claim due as claimed by the judgment creditor.

In this action the plaintiff has taken another course, and one which, perhaps, was open to him, by suing the devisees and heirs-at-law, with the executors, claiming administration of the estate, and that the lands should be sold for the payment of his judgment debt. So the defendants, the devisees and heirs-at-law, as they had beyond question a right to do, set up by way of answer to plaintiff's claim exactly what they would be obliged to do in case they took the proceedings intimated, by injunction.

The issues were squarely raised in this action and they have been found in favour of the defendants, and after reading the evidence taken, not only before the learned trial Judge, but before the county court Judge, I fully agree with the result as found by the trial Judge in this case.

It is said, however, and contended before us, that it was not, nor is it, open to the defendants to dispute the county court judgment. The trial Judge has decided otherwise, and after considering the law governing the question, I fully agree with him.

In my judgment there are several points from which it would appear to be most inequitable at all events, were the law not so. In the first place the devisees and heirs-at-law were not, nor was any of them, parties to the County Court action; the plaintiff sued the maker of the

Judgment. note and joined with him the executors as endorsees; in
Robertson, J. strict law, as it now turns out, he had no cause of action
whatever against the executors, either as individuals or as
executors or trustees of the estate of the testator.

The note in question had been taken by the executors in their representative character in settlement of purchases made by the maker, for goods sold by the executors, part of the personal property of the estate, which the testator had specifically bequeathed to his wife, Jane, on condition that she should "pay such notes or accounts as are unpaid at time of my death." Instead of the widow paying these debts and taking the personal property, she, it is presumed, allowed the executors to sell the same, and, they, instead of selling for money to be paid at time of sale, gave a year's time for payment of the purchase money, taking a promissory note from each purchaser, payable to themselves as executors.

These notes the executors disposed of to the plaintiff, who held a note for \$200 and interest against the testator and his son William, who was the maker of the note in this action. The sale notes were endorsed by the executors "without recourse," which in law meant, and which, according to the verbal understanding at the time of the transfer was agreed, without recourse to them as executors, etc. And that being so, no judgment on that note could properly stand to charge the estate of the testator, but, unfortunately, the matter was not so fully litigated by the executors as it should have been.

They succeeded in saving themselves from personal liability, and allowed the matter to drop there, instead of appealing to a Divisional Court of the High Court; and more,—after the judgment was recovered, they acted in aid of the plaintiff by making an *ex parte* application to the Judge of the county court for an order under the Devolution of Estates Act, to be allowed to register a caution against the lands, thus revesting in themselves the real estate in order to make such lands liable for this judgment debt. In this, to say the least of it, they acted

unwisely and in an unfriendly way to the then owners of the real estate. Judgment.

Robertson, J.

I think they should have protested against any such proceeding. The contest was, at this time, really between the defendants, other than the executors and the plaintiff, and the executors should have done nothing to help the plaintiff in recovering a demand against the estate, which they themselves knew was not honestly due from the estate.

The more one considers the contention of the plaintiff herein, the more fallacious it appears—in regard to the right of the devisees and heirs to shew that the debt for which the county court judgment had been recovered was not in fact and in truth a debt due by the testator and one for which his estate was not liable—they (the devisees and heirs) being the parties interested in the lands out of which the plaintiff was seeking to make his claim.

If this were an ordinary administration proceeding and the plaintiff brought in his claim, under the judgment, and put the latter in as evidence of his claim, the heirs or devisees or persons interested in the lands sought to be charged, would have the right notwithstanding the judgment against the executors to disprove it: *Harvey v. Wilde* (1872), L. R. 14 Eq. 438; *Willson v. Leonard* (1840), 3 Beav. 373.

In *Eccles v. Lowry* (1876), 23 Gr. 167, the plaintiff's claim was on a judgment recovered against the executors at law. At the trial plaintiff put in the judgment and rested his case. Defendants, who were the heirs-at-law, took the objection that the judgment did not afford even *prima facie* evidence of the debt on which it was recovered, and rested their defence there. The plaintiff recovered. On rehearing it was held that the judgment was *prima facie* evidence and plaintiff was therefore entitled to recover, but on the merits and on an application being made a new trial was ordered on payment of costs, clearly shewing that the full Court there had no doubt as

Judgment. to the right of the heirs to disprove the original debt or
Robertson, J. claim, notwithstanding the judgment recovered at law on it.

There is no doubt in my opinion that the learned trial Judge was right in dismissing this action, and his judgment should be affirmed with costs, except as to the defendants the executors in so far as the costs of this motion are concerned; and on that question I agree with the learned Chancellor that they should not have the costs of the appeal.

The executors in their defence claim for the costs of defence in the county court action, and for the costs of obtaining the Judge's order for leave to register the caution. The learned Judge has not allowed these, and I think, properly. If the executors had appealed from the judgment of the county court, I think there is little doubt that that judgment would have been reversed with costs; and as to the other costs, *i.e.*, of obtaining an order for, and registering the caution, that was entirely a gratuitous proceeding on their part and should not be charged against the estate.

G. A. B.

BARBER V. McCUAIG. (2).

Estoppel—Res Judicata—Reported Reasons for Judgment—Premature Action—Second Action for Same Cause—Sale of Equity of Redemption—Assignment of Purchaser's Covenant—Exhaustion of Remedies.

The plaintiff, a mortgagee, took from the defendant, a mortgagor, an assignment of the covenant of a purchaser of the equity of redemption to pay off the mortgage, and on receiving certain securities from him agreed not to sue him until certain other remedies against sub-purchasers had been exhausted. The plaintiff then sued the defendant on his covenant in the mortgage, but failed in the action on the ground that the remedies mentioned had not been exhausted.

In this action on the same covenant :—

Held, that the Court might properly examine the pleadings, evidence and proceedings at the trial of the former action, and that the reports of the reasons given for the judgments might be looked at for the purpose of shewing what was decided : that the dismissal of an action on the ground that it was prematurely brought is no bar to another action on the same demand after time has removed the objection, and that the plaintiff having before this action was brought exhausted her remedies and made an arrangement with the purchaser of the equity of redemption by which she was placed in the same position with respect to him as she was in before she received the securities mentioned, was entitled to recover from the defendant in this action notwithstanding she had retransferred the securities to the purchaser and agreed not to sue on his covenant, such agreement having reserved the defendant's right to sue the purchaser of the equity of redemption should the covenant be reassigned by the plaintiff to defendant.

THIS was an action brought by the same plaintiff Statement. against the same defendant on the same covenant in a mortgage as reported in (1896), 24 A. R. 492, and (1898), 29 S. C. R. 126.

The defence set up that by deed of March 20th, 1889, the defendant conveyed the mortgaged lands to E. A. DuVernet, who covenanted with the defendant to assume and pay off the mortgage on maturity, and indemnify the defendant against it; that in 1889 and 1890, DuVernet granted the lands in separate parcels to three separate grantees, who respectively covenanted with him to pay off their proportions of the mortgage debt according to the portions of the land conveyed to them; that on October 31st, 1893, the defendant assigned to the plaintiff the above covenant of DuVernet to assume and pay off the mortgage, upon the understanding that the plaintiff would pursue her remedies against DuVernet, and not in the

Statement. meantime make any demand on the defendant under the mortgage; that on January 25th, 1894, without the knowledge or consent of the defendant, the plaintiff entered into an agreement with DuVernet, whereby the latter assigned to the plaintiff the covenants of the several purchasers from him to pay off their respective proportions of the mortgage, and the plaintiff covenanted and agreed with DuVernet not to make any claim against DuVernet till she had exhausted her remedies against the said purchasers from him; that thus the plaintiff had materially varied the terms of the contract between himself and the defendant by extending to DuVernet the time for payment of the mortgage money, and had thus released and discharged the defendant from all liability under the mortgage; that the plaintiff, by the agreement of January 25th, 1894, had materially impaired, if not altogether destroyed, the value of DuVernet's covenant, assigned to her by the defendant as additional security for payment of the mortgage money, and had in effect released DuVernet from his liability to pay off and discharge the said mortgage, and was, therefore, not now in a position to assign or secure to the defendant the full value and benefit of the said covenant, and it would, therefore, be unfair and inequitable to ask the defendant to pay the plaintiff the amount due under the mortgage.

The same defence was set up, that the plaintiff was not in a position to return to the defendant the covenant of DuVernet which had been assigned to her by the defendant and it was also contended that the matters were *res judicata* by the former action.

The action was tried at Toronto on the 1st of November, 1899, before MEREDITH, C. J., without a jury.

C. Robinson, Q. C., and W. H. Irving, for the plaintiff.
Aylesworth, Q. C., for the defendant.

It appeared that after judgment was given in the Supreme Court in the former action and before the issue

of the writ in this action the plaintiff had exhausted all her remedies against the lands and the purchasers from DuVernet and by an arrangement with him had repossessed herself of all her rights against him, as they existed when the defendant assigned DuVernet's covenant to her, and she alleged her ability and willingness on receiving payment of her debt due by the defendant to assign and transfer to him all the securities received by her from him, including his right against DuVernet. Statement.

The remaining facts appear in the judgment.

The following cases were cited and references made: *Barber v. McCuaig* (1896), 24 A. R. 492, and (1898), 29 S. C. R. 126, and cases there cited; *The New England Bank v. Lewis* (1829), 8 Pick. (Mass.) 113; *Dixon v. Sinclair* (1832), 4 Ver. 354; *Farwell v. The Queen* (1894), 22 S. C. R., at p. 558; *Rouse v. The Bradford Banking Co.*, [1894] A. C. 586; Phipson on Evidence, 2nd ed., p. 394; Taylor on Evidence, 9th ed., secs. 1695-1720; *The King v. The Inhabitants of Wick St. Lawrence* (1833), 5 B. & A., at p. 534; *Heath v. The Overseers, etc., of Weaverham*, [1894] 2 Q. B., at p. 115; *Houston v. Marquis of Sligo* (1885), 29 Ch. D. 448; *Trust & Loan Co. v. McKenzie* (1896), 23 A. R., per MacLennan, J. A., at p. 170; *Baynton v. Morgan* (1888), 22 Q. B. D., at pp. 80, 81.

January 16th, 1900. MEREDITH, C. J. :—

The parties to the litigation are the same as in a former action of *Barber v. McCuaig*, which was ultimately dismissed with costs. The reports of the various judgments delivered in the progress of the case to the Supreme Court of Canada are to be found in (1896), 24 A. R. 492, and (1898), 29 S. C. R. 126.

The present action is brought on the theory that, having now, as the plaintiff alleges, exhausted her remedies against the mortgaged lands and against the purchasers from DuVernet, she is entitled to the relief which she sought, but which was denied to her in the former action, because and

Judgment. as she contends only because, at the time that action was brought she had not exhausted those remedies and therefore, as was determined by the Supreme Court, the extent to which the covenant of DuVernet, which the defendant had assigned to the plaintiff, had been impaired by the plaintiff's covenant not to make any claim for the mortgage money or the interest of it or any claim relating thereto against DuVernet or his property unless and until she should have exhausted the remedies I have mentioned could only be determined by an exhaustion of those remedies, as provided by the agreement between the plaintiff and DuVernet; 29 S. C. R., at p. 134.

Meredith,
C.J.

It is clear, I think, if I am at liberty to look at the reasons given for the various judgments pronounced in the course of the former litigation, that the ultimate judgment was based upon the single ground last mentioned and upon the hypothesis that the covenant of DuVernet was in the hands of the plaintiff a collateral security for the payment of the mortgage debt; and that the contention of the defendant that, as between the plaintiff and DuVernet and him, DuVernet was to be deemed the principal debtor and the defendant a surety only in respect of it, and that the dealings of the plaintiff with the covenant of DuVernet had operated to release and discharge the defendant from all liability on his covenant; and the further contention which was given effect to in the Court of first instance, that even though the respective positions of DuVernet and the defendant were not those of principal and surety, the result of those dealings had operated to produce the same result, were negatived by the Supreme Court, and that if the judgment in the former action must be treated as a bar to the plaintiff's recovery in the changed circumstances a manifest injustice will be done to her; and that as the result of the form in which the conclusion reached by the Court of final resort has been entered of record.

The defendant, however, contends that the issues raised on the statement of claim and of defence in this action

being, as he alleges, identical with those raised on the pleadings in the former action, the matter put in issue between the parties on the present record is *res judicata*, and that I am not at liberty to go behind the formal judgment dismissing the action for the purpose of ascertaining from the reasons given for it the ground upon which the ultimate judgment pronounced was based.

Judgment.
Meredith,
C.J.

Whatever doubt there may be, where a question arises such as has arisen in this case, as to the right to look at the reasons given for the judgment pronounced for the purpose, in dealing with a defence of *res judicata* by a former judgment, of ascertaining where there has been a simple dismissal of the action upon what state of facts and what application of the law to the state of facts the judgment was based, there is no doubt that the Court may properly examine the pleadings and evidence and the proceedings which took place at the trial for that purpose.

Nor can there be any doubt that just as the report of any other decided case may be looked at for the purpose of ascertaining what the law is, the reports of the reasons given for the judgments in the former action may be looked at for that purpose.

I do not at all mean to say, for the contrary is no doubt the law, that if it appear from the reason given for a judgment pronounced in an action that the judgment proceeded on an erroneous view of what the law was, the judgment would not be a bar to a subsequent action for the same cause of action in cases where it would operate as a bar if the legal questions involved in the former action had been rightly decided.

Looking, then, for the purpose I have mentioned at the pleadings in the former action, I find that there are not several separate and distinct issues of fact raised, but a narrative is given of certain alleged acts and occurrences which are said to have either changed the position of the defendant in respect of the covenant sued on, from that of principal to that of surety and by reason of his occupying the position of surety have operated to discharge him from

Judgment. all liability on the covenant or without effecting that
Meredith, change of position have nevertheless produced the same
C.J. result.

Referring, then, to the decisions, I find that upon the facts pleaded and proved in the former action it has been held by the Court of Appeal that the defendant's position did not become changed to that of surety and that the Supreme Court not only did not express any dissent from that view, but, as it appears to me, adopted it. I must, therefore, accept what was thus decided as the law; then, as I read the judgment of Mr. Justice Gwynne, the conclusion of the Supreme Court was that the facts pleaded and proved did not establish the absolute discharge of the defendant, but only his discharge *pro tanto*, but that the plaintiff was not entitled to sue the defendant until she had exhausted her remedies against the lands and the purchasers from DuVernet for the reason I have already adverted to.

Had all this occurred in another action between different parties in which the issues raised were identical in form with those raised in the former action, I should be bound to follow the law thus laid down in deciding this case. That is beyond question, and in dealing with this case I must, I think, assume that the decision of the Supreme Court was based upon an application of the law as so laid down by it to the facts established by the evidence in the former action, and so assuming, it follows that all that was decided was that the plaintiff's action was prematurely brought.

If this be the correct view, it follows that the defence of *res judicata* in this case is not established, for, as is said in Black on Judgments, par. 714, "The dismissal of a suit, or judgment for the defendant, on the ground that it was prematurely brought, the cause of action not having yet accrued, is universally held to be no bar to another action on the same demand after time has removed the objection. It is no adjudication of the merits, the most it decides is that the claim or demand was not *then* due or

matured." Many cases are cited by Mr. Black in support of this statement of the law, and there are numerous reported cases in the English courts and one at least in the courts of this province in which it has been acted upon.

Judgment.
Meredith,
C.J.

The general rule upon which the proposition I have just referred to rests is succinctly stated by Chief Justice Zollars, in delivering the judgment of the Supreme Court of Indiana, in *Stringer v. Adams* (1884), 98 Ind., at p. 544, as follows: "The general rule is, that whatever was or might have been litigated in an action, will be deemed to have been settled and adjudicated; but what could not have been so litigated will not be so concluded by such adjudication."

Among the English cases to which I have referred *Newington v. Levy* (1870), L. R. 6 C. P. 189 (particularly the judgment of Mr. Justice Blackburn); *Hall v. Levy* (1875), L. R. 10 C. P. 154; and *Palmer v. Temple* (1839), 9 A. & E. 508, may be mentioned, and *Chisholm v. Morse* (1862), 11 C. P. 589, is the case decided in the provincial court.

In *Palmer v. Temple*, Lord Denman says: "The evidence shewed the grounds of that verdict (that is, the verdict in the former action) to be that the action was prematurely brought, viz., before the contract was rescinded, and before the defendant had disabled himself from completing it. The former judgment forms no obstacle to the recovery, now that that event has taken place. It is like an action brought for the price of goods before the credit had expired, which would not prevent a recovery for the same goods after that period": p. 521. The same view was taken by the Court of Common Pleas of this Province in *Chisholm v. Morse*, where the late Chief Justice Draper quotes with approval the part of Lord Denman's observations which refer to an action for the price of goods.

In *Palmer v. Temple*, the proceedings at the trial of the former action, including the direction given to the jury,

Judgment.**Meredith,
C.J.**

appear to have been given in evidence, and in *Chisholm v. Morse*, similar evidence was also given, including, as I gather from the report of the case, evidence as to the jury having given their verdict on the ground that the period of credit had not expired when the action was begun. The evidence was admitted apparently without objection, and no question seems to have been suggested at any stage that it was not admissible.

It is also to be observed that in *Palmer v. Temple*, for the reasons stated by Lord Denman, the defendant's plea that the causes of the two actions were identical was held to be negatived, and it follows that the plea of *res judicata* in this case is not proved, the causes of the former and of the present action for the like reason not being identical, and identity of the two causes of action is an essential element of the defence of *res judicata* in cases like the present.

It is evident from what was said by Vice-Chancellor Hall in *Lord Tredegar v. Windus* (1875), L. R. 19 Eq. 607, that he was of opinion that the reasons for the judgment given may be looked at for the purpose of ascertaining what was in controversy in the action, in order to determine whether a party is barred by the former recovery. And in *Houston v. Marquis of Sligo* (1885), 29 Ch. D. 448, it was held by the Court of Appeal that a note of the proceedings at the trial of a former action, drawn up by the presiding Judge for the purpose of being submitted to the Divisional Court on an application for a new trial, was admissible in evidence of what took place before him and what he decided on the trial of an action in which the defence of *res judicata* by the judgment in the former action was set up. In the former action the defendant had pleaded as an alternative defence that if a certain reservation which was alleged by the plaintiff to be embodied in a lease was found in it, it was inserted by mutual mistake of the parties and contrary to their previous agreement, and it was to prove that this issue had been found against the defendant that the evidence was offered and admitted.

It seems to me that these cases fully warrant me in holding that the report of the grounds of the decision by the Supreme Court in the former action, appearing in the official report of the decisions of that Court published under the authority of Parliament, are admissible in evidence to shew, and that it was open to the plaintiff to shew, what was decided in the former action.

Judgment.
Meredith,
C.J.

The evidence being admitted, and it being shewn by it that the plaintiff failed in the former action only because it was prematurely brought, she is not barred by the former recovery if she has shewn that she has now got rid of the only difficulty which then stood in the way of her recovery, and that, apart from the question to which I shall next refer, it was not, I think, seriously contended she had not done.

The plaintiff by her reply in the present action sets up that since the former recovery she has obtained a release from DuVernet of her covenant with him and that she is now in a position to reassign to the defendant on payment of the defendant's debt, DuVernet's covenant with the defendant, which the latter had assigned to her.

In the view I have taken this is not material, except on the question of the extent of the impairment of the security.

It, however, appeared in evidence that the plaintiff by an arrangement with DuVernet, contemporaneous with his release to her, agreed that she personally would not sue him on his covenant, but that her agreement not to do so should not affect in any way the defendant's rights against him under a reassignment to the defendant from the plaintiff if that should be made; and that it was part of the same arrangement that the plaintiff should assign to DuVernet the judgment which she has obtained against Maddeford, one of the purchasers from DuVernet, on the mortgage he had given to DuVernet, which was one of the securities assigned by the latter to the plaintiff, and a reassignment of her right against Bell, another of the purchasers from DuVernet, under the agreement of purchase which was another of those securities.

Judgment.
Meredith,
C.J.

Mr. Aylesworth contended that the effect of the arrangement referred to was to nullify DuVernet's release to the plaintiff, but that is not so, the provision enabling the defendant if the plaintiff assigns to him the covenant, prevents it having that effect. It was also contended that the transfer to DuVernet of the two collateral securities of Maddeford and Bell, prevented the plaintiffs recovering, but that contention is not, I think, well founded. The defendant's case is destructive of it. He repudiates the action of the plaintiff in taking them in lieu of a present right to sue DuVernet, that she had done that was the ground of his defence in the former as it is in the present action.

The rights of the parties as I understand them are that the plaintiff is entitled to recover on the covenant and the defendant is entitled to be compensated for any impairment of the security which he assigned to her, which has arisen from her dealing with that security as she has done. The securities which she has given up to DuVernet were his securities and not the defendant's, and the defendant has no cause of complaint against her because she had surrendered them to DuVernet. The defendant's right to compensation for the impairment, if any, of the security assigned by him to the plaintiff is in no way affected by the return of the securities of DuVernet to him.

There therefore will be judgment for the plaintiff for the amount of principal and interest due by the defendant on his covenant, to be ascertained by a reference to the Master-in-Ordinary, who will also ascertain the proper sum, if any, to be allowed to the defendant as compensation for the impairment, if any, of the security afforded by the covenant of DuVernet owing to the plaintiff's covenant with DuVernet, and deduct the sum, if any, so allowed from the amount of the plaintiff's claim, and the defendant must pay the costs of the action up to and inclusive of the hearing. The question of the subsequent costs will be reserved until after the Master shall have made his report, to be then disposed of by a Judge in Chambers.

G. A. B.

[DIVISIONAL COURT.]

IRVINE V. SPARKS.

County Court—Verdict of Jury—Term—New Trial—Appeal to Divisional Court.

In an action in a County Court tried with a jury a verdict was given in favour of the defendant. On motion in term the verdict was set aside, and a new trial ordered. The defendant appealed to a Divisional Court:—

Held, that the appeal did not lie.

THIS was an appeal from the County Court of Prescott and Russell in an action which had been tried before the County Judge and a jury, and a verdict rendered in favour of the defendant, which on motion in term, had been set aside and a new trial ordered.

Statement.

From this decision the defendant appealed to a Divisional Court, and when the appeal came up for argument on February 2nd, 1900, before BOYD, C., FERGUSON, and ROBERTSON, JJ., *Shepley*, Q.C., for the plaintiff, objected that an appeal did not lie. The right of appeal depends on sections 51, 52, 53, and 54 of R.S.O. ch. 55. Section 51 was preceeded by 58 Vict. ch. 13, sec. 44 (O.), which was substituted for sec. 41 of R.S.O. 1887. In *Brown v. Carpenter* (1896), 27 O.R. 412, it was determined that there was no right of appeal to a Divisional Court from an order under sec. 44, sub-sec. 3 of the Law Courts Act of 1895, 58 Vict. ch. 13 (O.), now sec. 51, sub-sec. 3, R.S.O. ch. 55. *Cantelon v. Thompson* (1897), 28 O.R. 396, was a case on precisely the same facts as in this case, and it was there held that there was a right of appeal, but that case was determined on the Act as it stood in 1895. The amendment found in the revision of 1897, brings this case within the principle of *Brown v. Carpenter*, and the reasoning of *Cantelon v. Thompson* is no longer applicable.

Aylesworth, Q.C., contra. The defendant here had the finding and judgment of a jury in his favour, and no decision touches that point. *Brown v. Carpenter*, only decides that the unsuccessful party shall not have a second appeal. It was never intended that an unsuccessful party

Argument.

should have no appeal. The Queen's Bench Divisional Court have decided in favour of the right to appeal: *Cantelon v. Thompson* (1897), 28 O.R. 396; *Donaldson v. Wherry* (1898), 29 O.R. 552.

The defendant is entitled to appeal as "the opposite party" under sub-sec. 5 of sec. 51, and as there is no provision to the contrary, he is also entitled under section 52. Section 52 does not apply to cases coming under section 51, as was decided in *Weaver v. Sawyer* (1889), 16 A.R. 422, in reference to the similar sections in R.S.O. of 1887 ch. 47.

Shepley, in reply, referred to section 41.

February 7, 1900. BOYD, C. :—

This case was tried with a jury in the county Court and a verdict was rendered for the defendant.

Upon motion of the plaintiff a new trial was directed, and from this the defendant appeals to the High Court.

At the opening of the appeal, it was objected by the plaintiff that an appeal did not lie under the statute R.S.O. ch. 55. This preliminary point was argued and is now to be disposed of by us. By section 51 (4), the motion for a new trial in a jury case must be made to the County Court. No further appeal is given to the opposite party to the Divisional Court in case a new trial is (as here) granted by any of the clauses of section 51. This was, in effect, conceded during the argument.

The only other possible means of taking a further appeal is under section 52. This is correctly noted in the margin as providing for appeals from the decision of a "Judge of the County Court" as distinguished from appeals from the "County Court" which are provided for by section 51. The jurisdiction to grant new trials pertains to "County Courts" as such, and not to Judges of the courts as appears explicitly by sec. 41, ch. 55 R.S.O. 1897. The same construction was given to the

original of section 52 by the Divisional Court in *Brown v. Carpenter* (1896), 27 O. R. 412. Judgment.
Boyd, C.

I think the objection is well founded and that the appeal should be struck out, but it is not a case for costs.

FERGUSON, J. :—

The action was tried in the county court of the united counties of Prescott and Russell with a jury, and the verdict was for the defendant.

On motion before the same court that verdict was set aside and a new trial ordered.

From this order is the present appeal, the defendant contending or seeking to contend that the order was erroneous and that the verdict in his favour should not have been set aside.

The plaintiff objected that the appeal to this Division or any Division of the High Court does not lie.

The case falls, as I think, under the provisions of sub-sec. 4 of sec. 51 of ch. 55 R. S. O. 1897, commonly known as the County Courts Act.

I have again examined the various enactments in former statutes, referred to on the argument of this appeal, as well as the present provisions in the Revised Statutes, and I am of the opinion that the objection is well taken and that the appeal does not lie. So long as the decision in *Brown v. Carpenter* (1896), 27 O. R. 412, remains unchallenged, I do not see how this Division can decide otherwise.

Not a case for costs.

ROBERTSON, J. :—

I fully concur in the opinions expressed by the Chancellor and my brother Ferguson.

G. A. B.

[DIVISIONAL COURT.]

RE WOOLIVER

AND

THE CORPORATION OF THE COUNTY OF KENT.

*Public Schools—County Council—Appeal from Township By-law—
Alteration of School Section—Appointment of Arbitrators—Discretion
—R. S. O. ch. 292, sec. 39, sub-sec. 3.*

The provisions of sub-sec. 3 of sec. 39 of the Public Schools Act, R. S. O. ch. 292, whereby a county council may appoint arbitrators to hear an appeal against a by-law of a township council altering the boundaries of a school section are permissive not imperative. Judgment of ARMOUR, C. J., reversed.

Statement. THIS was an appeal by the municipal council of the county of Kent and the members thereof personally from an order of the Chief Justice of the Queen's Bench made on the 19th February, 1900, on the application of certain ratepayers and the board of public school trustees of school section 17 of the township of Chatham in the county of Kent, directing a mandamus to issue requiring the appellant council or the members thereof to appoint arbitrators to hear the appeal of the respondents from a by-law of the appellant council for the alteration of the boundaries of school sections Nos. 9, 12 and 17 of the township of Chatham.

The appeal was argued on February 26th, 1900, before a Divisional Court composed of MEREDITH, C.J., ROSE, and MACMAHON, J.J.

Aylesworth, Q.C., for the appeal, contended that the appointment of the arbitrators was a matter of discretion with the county council, and that they might exercise the power or refuse to do so: that no mandamus should be granted, and that even a mandamus, while it might direct action to be taken, would not direct *what action* should be taken, and referred to R. S. O. ch. 292, secs. 38 & 39; *Re Powers and Township of Chatham* (1898), 29 O. R. 571; *Coolican v. Hunter* (1877), 7 P. R. 237.

John S. Fraser, contra, contended that the only course of action open to the county council under sub-sec. 3 of sec. 39 R. S. O. ch. 292, was to appoint arbitrators "to revise, determine or alter the boundaries," etc., and that there was no other power in them; that the word "may" is imperative here as the act to be performed was a duty in the case of a public body. He referred to *Re Eyre and The Corporation of Leicester*, [1892] 1 Q. B. 136. *Aylesworth*, in reply.

Argument.

March 1, 1900. MEREDITH, C.J. :—

The sole question raised for consideration by the present appeal is, as to whether the provisions of sub-sec. 3 of sec. 39 of the Public Schools Act (R. S. O. ch. 292), are imperative or permissive.

Sub-sec. 3, as amended by 62 Vict., 2nd sess., ch. 36, sec. 4 (O.), reads as follows: "The county council may appoint as arbitrators * * to hear such appeal and to form," etc.

Some assistance in arriving at, if not a guide to, the meaning of the language of the sub-section may, I think, be found by tracing the history of the legislation as to the matter with which it deals, which has preceded that now under consideration.

Before the passing of 34 Vict. ch. 33 (O.), there was no appeal from the action of a township council in forming or altering the boundaries of a school section within its jurisdiction.

By section 16 of that Act, an appeal was for the first time given to the majority of the trustees or any five rate-payers of a school section "against any by-law or resolution which has been passed, or may be passed, by their township council for the formation or alteration of their school section." The appeal was to the county council of the county in which the section was situate, and the provision was that "it may and shall be lawful for such county council to appoint a committee * * , to investigate

Judgment. * * , and confirm or disallow the by-law or resolution
Meredith, complained of."
C.J.

By the Consolidated Public School Act of 1874 (37 Vict. ch. 28), sec. 61, sub-sec. 9, it was provided that it should be "the duty" of the county council to appoint the committee to investigate the matter of the appeal or complaint.

In the consolidation of 1877, the language was changed to "The council of the county * * shall appoint a committee": R. S. O. 1877 ch. 204, sec. 88 (1).

In sec. 82 the Act, 48 Vict. ch. 49 (O.), by which the Public School law was consolidated, there is another change of language, the words there used being "The county council shall forthwith appoint as arbitrators" (sub-section 2), the persons to be appointed being for the first time referred to as arbitrators.

By 50 Vict. ch. 39, sec. 14 (2) (O.), the words "shall forthwith" were struck out and there were substituted for them the words "may if it thinks fit."

In the consolidation of 1891, the sub-section was re-enacted as it then stood: 54 Vict. ch. 55, sec. 82 (3).

In the consolidation of 1896, section 82 of the Act of 1891 with its sub-sections became section 39 and its sub-sections with the exception that the words "if it thinks fit" were dropped (sub-section 3), and so the language stands in the consolidation of 1897, R. S. O. 1897, ch. 292, sec. 39 (3).

It is plain from this review that the Legislature in 1887 deliberately abandoned the policy of making it obligatory upon the county council, where an appeal to it is made, to appoint arbitrators to consider and decide the appeal, and plainly vested in the county council the discretion of appointing them or not, as it might in the exercise of that discretion deem proper.

Then does the dropping of the words "if it thinks fit" indicate an intention to return to the policy which had prevailed before 1887? I think not.

It is true that the Act of 1896 was as well a revision

as a consolidation of the existing law, but the note at the foot of section 39 treats that section as but a consolidation of 54 Vict. ch. 55, sec. 82, in which the elided words appeared, and there is no note of any amendment of that section having been made, thus indicating that section 39 was deemed to be the exact equivalent of section 82 of the earlier Act.

Judgment.
Meredith,
C.J.

Seeing that the policy of the Legislature has varied so much and that when it desired that its enactment should be imperative it said so in plain terms, as witness the phrases "it shall be the duty," "shall," "shall forthwith," I am of opinion that the words "if it thinks fit" were dropped, not because any change of policy had been decided upon, but because it was thought that those words were unnecessary, and that without them the legal effect would be the same.

It was argued that as there is no machinery provided for the hearing of the appeal by the county council, it cannot have been intended that the word "may" should be permissive, but the construction which I give to the section does not involve the hearing of the appeal by the county council, but that the county council may determine that nothing has been shewn to indicate that there is such foundation for the appeal as to justify the expense of a reference to arbitration.

Why, it may be asked, should the county council be compelled to send to arbitration every case in which five ratepayers complain, however unreasonable or unfounded on their own shewing or to the knowledge of the members of the county council their complaint may be?

The difficulty suggested, if difficulty it be, clearly existed from 1887 to 1896, and the Legislature does not appear during that time to have thought it substantial enough to justify a return to its former policy, and if it had in 1896 come to the conclusion to return to its former practice, it would, I think, have left no doubt of its meaning but have adopted the imperative "shall."

I am, therefore, with respect, of opinion that the order

Judgment. for the mandamus ought not to have been made, and that
Meredith, the appeal should be allowed with costs, and the order
C.J. discharged with costs.

ROSE, and MACMAHON, JJ., concurred.

G. A. B.

[DIVISIONAL COURT.]

RICKETTS ET AL.

v.

THE CORPORATION OF THE VILLAGE OF MARKDALE.

Municipal Corporations—Negligence—Child Playing on Highway—Repair—Death of Child—Damages.

A municipality is liable for damages arising through its negligence to children playing upon the highway where there is no general law limiting this liability in that regard and no local law prohibiting their playing on the highway and when their presence is not prejudicial to the ordinary uses of the street for traffic and passage.

Judgment of FALCONBRIDGE, J., reversed.

In an action by a parent for the death of his child through negligence it is not necessary to shew any pecuniary advantage derived from the deceased, it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit in the future capable of being estimated.

Judgment of OSLER, J. A., in *Blackley v. Toronto Street R. W. Co.*, 27 A. R., at p. 44 note, followed.

Statement. THIS was an appeal by the plaintiffs from the judgment of FALCONBRIDGE, J., reported *ante* p. 180, which was argued on January 31st and February 1st, 1900, before a Divisional Court composed of BOYD, C., FERGUSON, and ROBERTSON, JJ.

W. H. Blake, for the appeal. The Judge at the trial was guided by *Stinson v. City of Gardiner* (1856), 42 Me. 248; *Blodgett v. The City of Boston* (1864), 8 Allen (Mass.) 237, and other Maine and Massachusetts cases; and *Harrison v. Duke of Rutland* (1892), 9 Times L. R. 115; [1893] 1 Q. B. 142. The first two cases were decided in

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two States where there was special legislation relating to the duties of the municipality to travellers: see Shearman & Redfield on the Law of Negligence, 5th ed., sec. 370, where they are cited and distinguished, and in the last case the soil of the highway was vested in the defendant, subject to a mere right of passage and this differentiates an English from a Canadian highway where it is vested in the Crown or in the municipality: R. S. O. ch. 223, secs. 599, 601. The learned Judge cited *Singleton v. The Eastern Counties R. W. Co.* (1859), 7 C. B. N. S. 287; *Hughes v. Macfie*, and *Abbott v. Macfie* (1863), 2 H. & C. 744; but the text writers all agree these are overruled by *Clark v. Chambers* (1878), 3 Q. B. D. 327. The present law is as laid down in *Lynch v. Nurdin* (1841), 1 Q. B. 29. See also *Smith v. Hayes* (1898), 29 O. R. 283; *Sangster v. The T. Eaton Co.* (1894), 25 O. R. 78; *Jewson v. Gatti* (1885), 1 Times L. R. 635; (1886), 2 Times L. R. 381 and 441. The case of *The Town of Portland v. Griffiths* (1885), 11 S. C. R. 333, was decided upon the ground that there had been contributory negligence on the part of the plaintiff and the expressions used by certain of the Judges to the effect that the plaintiff could not recover as she was not at the time using the highway for its legitimate purpose are obiter. A child has a right to use a street for purposes of play: *The City of Chicago v. Keefe* (1885), 114 Ill. 222; *McGuire v. Spence* (1883), 91 N. Y. 303; Beven on Negligence, 2nd ed., 431; *Harrold v. Watney*, [1898] 2 Q. B. 320; *Castor v. The Corporation of the Town of Uxbridge* (1876), 39 U. C. R. 113; *Huffman v. Bayham* (1899), 26 A. R. 514. Even if the child was not lawfully in the place where it was injured, there was an allurement: 31 Am. Law Review 891; Eversley on Domestic Relations, 2nd ed., pp. 801, 802; *Morrison v. McAra* (1896), 23 Ct. of Sess. Cas. (4th series) 564; *Hesketh v. The City of Toronto* (1898), 25 A. R. 449.

J. B. Lucas, and W. H. Wright, for the town of
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Argument. Markdale, contra. Under our statute the liability of the municipal corporations is limited to the cases of those properly using the highway: *Steinhoff v. Corporation of Kent* (1887), 14 A. R. 12, per OSLER, J. A., at pp. 18 and 19, citing *The Town of Portland v. Griffiths* (1885), 11 S. C. R. 333; *Richards v. Inhabitants of Enfield* (1859), 13 Gray (Mass.) 344; *Toms v. The Corporation of the Town of Whitby* (1875), 37 U. C. R. 100. We rely upon *Harrison v. Duke of Rutland*, [1893] 1 Q. B. 142. The parents were guilty of contributory negligence in allowing the child to go out to play on the street: *Bailey v. Neal* (1888), 5 Times L. R. 20. The evidence does not shew that the timbers interfered with the proper use of the road, so it was not out of repair. The timbers were not put there by the defendants: *O'Neil v. Windham* (1897), 24 A. R. 341; *Municipal Council of Sydney v. Bourke*, [1895] A. C. 433; *Municipality of Pictou v. Geldert*, [1893] A. C. 524. The corporation had no notice that the timbers were there: *Rice v. Whitby* (1898), 25 A. R. 191. The accident happened in the ditch, between the sidewalk and the travelled portion of the road, and most of the cases cited for the plaintiffs were sidewalk cases. The evidence does not support pecuniary damage to the plaintiffs by the death of a child seven years of age who was bound by law to go to school for the next seven years: R. S. O. ch. 296, and in that way he would be a source of expense: *Mason v. Bertram* (1889), 18 O. R. 1; *Holleran v. Bagnell* (1879), 4 L. R. Ir. C. L. 740. We also refer to *Burke v. Cork & Macroom R. W. Co.* (1879), 4 L. R. Ir. 682; *Mew's Digest*, vol. 10, cols. 108-110 under "Negligence"; *Sykes v. The North-Eastern R. W. Co.* (1875), 44 L. J. C. P. 191; *Duckworth v. Johnson* (1859), 4 H. & N. 653; *Atkinson v. Chatham* (1899), 26 A. R. 521; *Beven on Negligence*, 2nd ed., 732.

W. J. Hatton, for the third party. The third party did not put the timbers on the highway, that was done by an independent separate contractor, who could not render him liable for his acts: *Saunders v. City of Toronto* (1899),

26 A. R. 265; *Jones v. Corporation of Liverpool* (1885), **Argument.**
14 Q. B. D. 890; *Quarman v. Burnett* (1840), 6 M. & W.
499.

Blake, in reply, referred to 31 Am. Law Review, at p.
900, and the case there *Kerr v. Forgue* (1870), 54 Ill. 482;
Grand Trunk R. W. Co. v. Jennings (1888), 13 App. Cas.
800, at p. 804; Beven on Negligence, 2nd ed., 182 *et seq.*
and 218 *et seq.*; *Foley v. Township of East Flamborough*
(1899), 26 A. R. 43.

March 2nd, 1900. BOYD, C. :—

The judgment of my brother Falconbridge, who tried this case, is favourable to the plaintiffs' right to recover, except in one respect, viz., that the child who was killed had no right to be at play on the streets, and as to one so using the street, the municipality was under no obligation to repair or keep unobstructed.

The decisions relied upon are some English, some American, and one Canadian, though none of them authoritatively decided the point as to our Court.

The English cases are to be broadly distinguished from Canadian on historic grounds. The English highway is the outcome of dedication by private proprietors, who still remain owners of the soil, subject to the public right of easement; that is, a mere right to pass and repass. Hence it was held if the public right of way (= street or highway) be used by one for any purpose, lawful or unlawful, other than that of passage, he is a trespasser: Crompton, J., in *The Queen v. Pratt* (1855), 4 E. & B., at p. 868. That, probably, is to be modified, as stated by Esher, M. R., in *Harrison v. Duke of Rutland*, [1893] 1 Q. B., p. 146. But in Ontario there is no private proprietorship in the soil of public roads. The land, at first the waste land of the Crown, held for the beneficial use of the public, was, in course of settlement, surveyed so as to allocate road allowances, which became the streets and highways of the country.

The freehold of these highways and "public communi-

Judgment. cations" remained in the Crown ; jurisdiction and control
Boyd, C. over them was committed to the municipal councils, while the possession and enjoyment of them was vested in the municipality : see Mun. Act, secs. 532 (2), 599-601. Now, when possession is vested in the municipality, that means and embraces all the inhabitants of the locality included in the political corporation—men, women and children : Mun. Act, sec. 2 (10), and sec. 5.

In England, the repair of public roads originated in immemorial custom, whereas, in this Province, the obligation is ascertained by statute, and so cast upon the local municipality. The measure of the duty to repair is to be found in the language of the Legislature.

In the American States the condition of the highway much resembles that which obtains in Ontario. But there are a few States, where the legislation as to repairing streets is limited, so that the duty arises only for the benefit of travellers. The cases cited below are drawn from the Courts of these exceptional States.

Whereas, in our law, the obligation is made to extend to all persons. Thus, R. S. O. ch. 223, sec. 606: "Every public road, street * * shall be kept in repair by the corporation, and on default * * the corporation * * shall be civilly responsible for all damages sustained by any person by reason of such default." So in section 608, the case of damages sustained by any person by reason of obstruction in the highway is provided for, and section 612.

When the course of legislation is regarded, it becomes manifest that while the primary purpose of the highway is for public travel and passage, yet there are many other modes of user which are recognized as permissible and legitimate, so long as public convenience is not interfered with.

The Act to Regulate Travelling on Public Highways, ch. 236, is not confined to travellers, but extends to other persons being upon the highway : see section 4. Dogs and swine may be at large upon the streets, and so may drunk

persons, if not disorderly : R. S. O., pp. 1899, 2549 and 2562. Judgment.
Boyd, C.

There may be retail selling, and crying and vending of small wares in the streets p. 2594. Hotel runners and others may importune travellers ; beggars and malformed persons may appeal for help in the streets : pp. 2602, 2607.

In the matters foregoing there may be regulations or there may be restrictions according to local requirements, but the permission to be on the streets is assumed, unless the particular by-law prohibits.

So, as to children ; a child who is found begging or wandering about at late hours in any street, may be taken in charge by the constable : ch. 259, sec. 7. See also p. 3509. And children are not to be in the streets at night-fall if the municipality enacts the "Curfew-bell" by-law : ch. 259, sec. 21. So it is recognized that children are in the habit of riding behind waggons, etc., and that they amuse themselves by coasting or tobogganing on the streets. I deduce the conclusion that children may play on the highways when there is no prohibitory local law, and where their presence is not prejudicial to the ordinary user of the street for traffic and passage.

To the same effect is the American state law generally. Thus in *McGarry v. Loomis* (1875), 63 N. Y. R., at p. 108, Church, C. J., said : "That it is not unlawful, wrongful or negligent for children on the sidewalk to play, is a proposition which is too plain for comment." And in *The Quincy Horse, etc., Co. v. Gnuse* (1889), 38 Ill. App., at p. 223, it is decided that city streets are intended for the use of children as well as of vehicles, not merely as ways by which to get to school, or upon errands of business, but as places in which to play, consistently with the rights of others, and subject to risks for want of due care on their own part.

American law is concisely summed up in the 5th edition of *Shearman & Redfield on Negligence* : sec. 370.

In Massachusetts and Maine under peculiar statutes a

Judgment.**Boyd, C.**

child playing upon the street, or a person stopping by the wayside to converse, is not making such use of the highway as entitles him to complain of its defects.

• In other jurisdictions not embarrassed by statutory construction the rule is that the same duty is owing to a child at play on the street as to one passing over it for business or pleasure.

The Canadian case of *The Town of Portland v. Griffiths* (1885), 11 S. C. R. 333, arose under New Brunswick law. The duty to repair the street was under the Provincial local statute, 34 Vict. ch. 11, sec. 83, making a general provision as to repair (not saying for whom). The Chief Justice, Ritchie, was of opinion that the repair was only for those lawfully using the street in passing to and from. But Henry, J., was equally explicit that any one using the street for a lawful purpose, such as washing windows, could legally use the sidewalk, and recover, if injured, through its being out of repair. Mr. Justice Gwynne goes carefully over all the points of the case, but is silent as to this one from which the reasonable inference would be that he did not regard the objection raised by the Chief Justice as a serious one. I take this case to be rather in favour of than against the present judgment.

I may notice a Scottish case decided in 1896, *Morrison v. McAra*, 23 Rettie 564 (Ct. Sess. Cas., 4th series), where a child at play in the street being injured by a lorry recovered reparation, but no comment is made on the point now under consideration.

I think the conclusion of Mr. Justice Falconbridge should not prevail even if it more clearly appeared in the evidence that the child was at play on the timber when the accident happened by which he was killed. Other boys had played there or were playing there, and this child having left home with his hoop rolled it along the sidewalk up to this place and then went on the timber, whereupon the stick slipped or slewed and knocked him down between the pieces whereby death ensued forthwith.

I have read and approve of the very full examination

of all the other aspects of the case made by my brother Ferguson, and do not think that anything can usefully be added to his opinion. I also agree in his disposition of the claim against the third party, and as to the costs.

Judgment.

Boyd, C.

FERGUSON, J. :—

The action is brought under the provisions of the statute commonly known as Lord Campbell's Act.

The plaintiffs are the father and mother of the lad James Edgar Ricketts, who was killed by the sliding or falling of the timbers hereafter mentioned and alluded to.

The plaintiffs state their cause of action after this manner. They say that the defendants, being owners of and having jurisdiction over a certain public highway in the village of Markdale named Mill street, authorized and allowed certain square timbers to be piled near the sidewalk on said street, at a point about four rods distant from where the Canadian Pacific Railway intersects the street, and where, to the knowledge of the officers of the corporation, children were wont to congregate, and knowingly allowed said timbers to remain piled upon said highway until the time of the accident complained of; the position and location of said timbers being such as to invite children to walk and play thereon, the said timbers being so piled as to be dangerous to any person walking thereon or being in their vicinity: that on the 13th day of April, 1899, while the said James Edgar Ricketts was lawfully upon the said highway and was walking upon one of the said timbers, another stick of timber which occupied a more elevated position fell upon the said James Ricketts and killed him: that prior to the accident the said James Edgar Ricketts lived at home with his parents, the plaintiffs, and was able to perform, and did perform valuable services of various kinds for the plaintiffs, and with increasing years his services would have been still more valuable to the plaintiffs. They then say that the said James Edgar Ricketts died intestate, and that no administrator has been appointed, and claim damages from the defendants.

Judgment. The defendants plead in denial generally, and say that **Ferguson, J.** the accident was caused by the negligence of the said James Edgar Ricketts: that there was contributory negligence on the part of the plaintiffs, which caused the accident, and they specifically deny that the plaintiffs sustained any damage as they (the plaintiffs) allege by reason of the accident, or at all.

Markdale is a village of about 800 or 900 inhabitants. This highway, Mill street, runs through the central part of the village and to the railway station. On one side of the street at the place where the timbers were left, there was a sidewalk six feet wide at some little elevation from the ground, and there was what has been called a ditch between this and the part of the roadway usually travelled by teams.

From the evidence I would say that this ditch is really a somewhat gradual slope from the usually travelled part of the roadway down to a lower line or gutter at or near the outer line of the sidewalk. At this place, a few rods from the railway station, six large pieces of squared timber from thirty-five to fifty feet long were, during a time of deep snow, unloaded and left on or in the snow in or over this ditch. Three of such pieces of timber were under the other three. The three that were under lay obliquely to the course of the road and sidewalk, and the three pieces that were upon these three lay obliquely across them, and as it appears there must have been some inclination of the upper surfaces of the under pieces.

It was after the snow had melted and almost gone that the accident occurred.

These timbers, or some of them, extended from a point or line from six inches to a foot inwards upon the sidewalk to a point or line in upon the usually travelled part of the roadway from three to four feet, and as some witnesses say, more. There is evidence going to shew that the timbers did not extend further in the direction of the travelled part of the street than being upon the ridge or comb of grass along the side of this travelled part; but after a care-

ful consideration of the evidence on the subject I think a Judgment.
fair finding is that they did extend three or four feet upon Ferguson, J.
the travelled part at least.

These timbers were so placed, or happened to be in such a position as to one another, that there was a probability that if a person were to step upon one of the uppermost ones, it, or the one end of it, would slide or slew, as the witnesses put it, upon the underlying ones so as to be dangerous to the person so stepping upon it or others who might happen to be there and in the way of such sliding or slewing. And the timbers were of such dimensions and weight that their moving or being moved in this way was or would be a serious thing for those with whom they would come in contact. The extreme outer point to which the timber extended was twenty-three feet from the limit of the allowance for road, sixty-six feet wide, there being, however, room for persons to pass on the sidewalk, and room on the travelled part of the road for waggons and teams to pass, proper care being taken in either case not to drive or walk against the timbers.

The timbers had been in the above in part described position, except so far as changes, if any, had taken place by reason of the melting of the snow into or upon which they were at first unloaded, for a period of at least three or four weeks, and their existence there was known to members of the defendant corporation, who were passing and repassing the place frequently, if not day by day, and I cannot but be of the opinion upon the evidence, that there was ample time after knowledge of and notice to the defendants, and before the accident, for them to have had the timbers removed, or at least placed in a position in which there would be less, if any, danger by reason of their presence on the road.

It appears, I think, that while these timbers were in this situation they offered an invitation and were an allurement to boys and children for the purposes of playing, and it appears that boys and children in considerable numbers

Judgment. had been before, and were at the time of the accident playing upon and around these timbers.
Ferguson, J.

On the 13th day of April, 1899, the deceased, James Edgar Ricketts, had been permitted by his mother to play on the sidewalk, and in so doing, came to the place where these timbers were; other boys were upon the timbers then and this boy went upon them likewise, presumably in the course of his diversion or play.

It does not appear with precision how the misfortune took place, but it does appear that while this boy was so upon the timbers one of them moved ("slewed," as the witnesses say), and that the boy having fallen through between two of these uppermost timbers, the one of them that was sliding or slewing upon the timbers underneath caught his head between it and another of the uppermost timbers and so by pressure or impact caused his death immediately.

These timbers had not been placed where they were by the defendants, nor were the timbers the property of the defendants. The timbers were the property of one Ryan and were placed or left where they were by a person who had a contract with Ryan for hauling the timber from the bush to the railway station, the particulars of which will be stated when I come to deal with the part of the case relating to the liability or not of the third party brought in.

It was not denied that the defendant corporation had the duty cast upon them by the statute of keeping this street or highway in repair, and after having given the matter due consideration, both as to the locality in which the timber was and all the surrounding circumstances, including the publicity of the place, the amount of travel or traffic, so far as shewn, upon the street, etc., I have arrived at the opinion that the presence of these timbers in the position and at the place in which they were, as I have endeavoured to describe the same, constituted and was an obstruction of the highway and that after knowledge of and notice to the defendant corporation

and before the happening of the unfortunate accident, Judgment. there was ample time to remove the timbers or in some Ferguson, J. way to abate the obstruction.

I am further of the opinion that this obstruction was such as to be a want of repair of the highway, and that by permitting the obstruction to remain as the defendant corporation did, they were guilty of such a breach or violation of their duty as rendered them liable to be successfully indicted for a misdemeanour; the duty resting upon them being a duty owing to the public at large and to all persons being lawfully upon the street or highway.

Apparently, but, as I think not really, against this last statement are the United States cases: *Stinson v. City of Gardiner* (1856), 42 Me. 248; *Blodgett v. The City of Boston* (1864), 8 Allen (Mass.) 237; *Tighe v. City of Lowell* (1876), 119 Mass. 472, and perhaps others. These three cases were referred to by the learned trial Judge in his judgment. They were, however, decided under the provisions of enactments differing from the provisions of our statute on the subject of repairs to highways.

As stated by Bigelow, C. J., in the case *Blodgett v. The City of Boston*, the duty imposed was to keep the roads in repair "so that they may be 'safe and convenient for travellers at all seasons of the year,'" and it was upon this restriction of the generality of the duty imposed that the case was decided, and in the others of the cases there was either this or a similar restriction in the statutes imposing and governing the liability.

These same cases are mentioned and referred to in the case *McGuire v. Spence* (1883), 91 N. Y. 303, where it was held that when a child was injured in consequence of an obstruction on the street, it was no defence to say that the child was playing on the street, instead of using it for the ordinary purposes of travel. The judgment in this last case is very short, the Court seeming to be unanimous in the opinion that the matter was too plain

Judgment. for argument. See also the case *The City of Chicago v. Ferguson, J. Keefe* (1885), 114 Ill. 222, at pp. 226, 227.

Our statute on the subject, ch. 223, sec. 606, is in its provisions very general: "Every public road, street, bridge and highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation, besides being subject to any punishment provided by law, shall be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained."

As to the persons who may have the benefit of the enactment there seems to be no restriction whatever.

The defendant corporation were, as already said, in default in not keeping this street in repair and were therein guilty of negligence. It is plain, as I think, that such negligence of these defendants, if it were assumed that there was not contributory negligence was the cause of the disaster, for had the timbers not been there the misfortune would not have occurred. I think it plain, that the fact that the boy was playing on the street and not using the highway in the ordinary way of travel affords no defence.

Then as to the alleged contributory negligence of the unfortunate boy set up by the defence. The boy was under seven years old. In the excellent and exhaustive work *The American and English Encyclopædia of Law*, 2nd ed., vol. 7, pp. 405 and 406, it is stated: "That children so young as to be *non sui juris* cannot be guilty of contributory negligence. And children who have attained an age where they are not wholly irresponsible are not required to exercise the same care and prudence that would be demanded of an adult similarly situated, but only the care of a child of equal age and ordinary childish care and prudence. And even when a child has reached years of discretion, and become, as a matter of law, responsible for his conduct, no higher degree of care will be exacted of him than is usually exercised by persons of a similar age, judgment, and experience."

And at p. 408: "Nor will a child negligently injured upon a railroad, or by defects in a public highway, or by dangerous machinery, or by explosives or in any other way, be charged with contributory negligence, if, at the time of such injury, he was doing what might have been expected of an ordinarily careful and prudent child of the same age, making due allowance for the natural instincts of childhood."

In *Shearman & Redfield*, on the Law of Negligence, 5th ed., at sec. 73a, pp. 111, 112, it is said: "Some degree of care may justly be required, even from children of six or seven years. But such a child is every where *presumed* to be incapable of contributory negligence." In *Sangster v. The T. Eaton Co.* (1894), 25 O. R., at p. 83, the learned Chief Justice referring to *Gardner v. Grace* (1858), 1 F. & F. 359, said: "The doctrine of contributory negligence is said not to be applicable to a child of tender years."

One asks, what did this boy do or leave undone that can be relied on as contributory negligence? He was on the sidewalk playing. The timbers were as or about as I have described them. Children had been playing on the timbers and some one or more boys were on the timbers at the time. To go upon the timbers required no climbing or other extraordinary exertion. It was not necessary to commit anything at all in the nature of a trespass to go upon the timbers. They were on the public street and he had a right to go there. To any one at all conversant with the instincts and general conduct of boys when at play these timbers would appear to afford an invitation and be an allurement to boys to go upon them, and I am unable to see that this boy in going upon these timbers, for the purposes of his childish amusement and play did any thing more than, or any thing different from what might be reasonably expected from boys generally of his own age, or even from ordinarily prudent boys much older than he.

I am of the opinion that contributory negligence on the part of this boy has not been made to appear and cannot be relied on as a defence.

Judgment. There seems to be no evidence to support the contributory negligence charged against the father, and the only item of evidence in support or professedly in support of the negligence charged against the mother is that she permitted the boy to go to play on the sidewalk with his "little hoop," and this in my estimation does not support or nearly support the charge.

The contention of the defendants as to contributory negligence I think entirely fails and I am of the opinion that the evidence shews that the boy lost his life by and through the negligence of the defendant corporation, and that such negligence was the proximate cause of the disaster.

Yet all this will not be sufficient to sustain the action unless damages are shewn, that is to say, it must appear that the plaintiffs, the parents of the boy, had some reasonable expectation of pecuniary advantage to arise to them by the continuance of the life of their son.

The learned Judge, before whom the action was tried, though of opinion so strongly against the plaintiff's on another ground that he dismissed their action, yet made an estimate of the damages, which he fixed at \$400.

In regard to the damages I am quite willing to say that I have felt difficulty—though perhaps unnecessarily. In the case *Blackley v. The Toronto Street R. W. Co.*, not yet reported,* Mr. Justice Osler, after a review of many authorities, stated a proposition which seems to assume the form of a Rule, and after having been at some trouble in examining cases on the subject, I am quite convinced that the learned Judge stated the law accurately. I may here say that he was the only member of the Court who considered the matter in that case, the other Judges being of the opinion that the plaintiff could not succeed in the action at all. The proposition is as follows: "It is for the tribunal to say, under all the circumstances, taking into account

*See Mr. Justice Osler's judgment in a note to *Rombough v. Balch*, 27 A. R., at p. 44.

all the uncertainties and contingencies of the particular case, whether there was such reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages." The learned Judge referring to *Pym v. The Great Northern R. W. Co.* (1862), 2 B. & S. 759. The authorities on the subject seem to have been exhaustively reviewed by members of the Court in the case *Lett v. St. Lawrence and Ottawa R. W. Co.* (1884), 11 A. R., commencing at p. 1, a case that seems to have been under review by and the judgment affirmed in the Supreme Court. For this reason and others I do not feel called upon here to write anything like what might be called a digest of the authorities on the subject.

Judgment.
Ferguson, J.

It seems not to be necessary to shew by evidence that any pecuniary benefit had been actually received from the deceased. In the case above referred to, Mr. Justice Osler said, "It has not been decided by any case by which we are bound that there must be evidence of pecuniary advantage derived from the deceased previous to his death; the contrary of this is decided in *Franklin v. South-Eastern R. W. Co.* (1858), 3 H. & N. 261, and in the case *Dalton v. South-Eastern R. W. Co.* (1858), 4 C. B. N. S. 296."

In the Am. & Eng. Ency. of Law, 1st ed., vol. 5, p. 129 (note), it is said: "To authorize a verdict for substantial damages in an action by a parent for the negligent killing of his infant child, it is not necessary to make proof of the amount of damages sustained. The jury may infer this from all the facts in evidence."

In the case *The City of Chicago v. Keefe* (1885), 114 Ill., at p. 230, the learned Chief Justice, delivering the opinion of the Court, said: "The question is in its nature incapable of exact determination, * * and a jury should therefore calculate the damages in reference to a reasonable expectation of benefit, as of right, or otherwise, from the continuance of the life." Then after referring to two leading English cases the learned Chief Justice said: "Parents and even brothers and sisters might reasonably

Judgment. expect in many ways to derive pecuniary benefit from the continued life of the intestate, as of grace and favour, if not of right at any age of life.”

Ferguson, J.

In the case *Condon v. The Great Southern & Western R. W. Co.* (1865), 16 Ir. C. L. R. 415, Pigott, C. B., said: “As to the probable performance of those duties, the jury were entitled to apply their own experience and knowledge of life, and to consider the habits of the peasantry in this country, and the probable amount of assistance and support which a widow might fairly and reasonably expect from her son”: p. 419.

After having examined many authorities I have arrived at the conclusion that the plaintiffs are entitled to succeed in this action, and that had the trial been by a jury, and had they estimated the damages at the amount found by the learned Judge who tried the case, their verdict could not properly have been disturbed. The statute, however, provides that the trial in such cases shall be before a Judge without a jury, and the learned Judge has as before stated, estimated the damages at the sum of \$400. If I had had the trial of the case, it is possible that I should not have estimated the damages at so large a sum, but I am far from saying that I can clearly see that there is error or extravagance in the estimate made by the trial Judge.

I am, for the reasons I have endeavoured to give, of the opinion that the plaintiffs are entitled to judgment for this sum of \$400, with their costs of the action. If it is desirable this sum might be divided equally between the two plaintiffs.

As to the claim made by the defendant against Charles Ryan, the third party brought in, it appears, as before stated, that Ryan was the owner of the timber that was left upon the street. This timber was owned by him and was in the bush apparently where it had been manufactured. It is shewn that Ryan made a contract with one Matthew Patton for the hauling of the timber from the bush to the ground or station of the Canadian Pacific

Railway Company at Markdale for the lump sum or price of \$10 and that the timber was hauled by Patton under this contract, he having obtained the assistance of one Moore in hauling it. Judgment.
Ferguson, J.

It also appears that Patton and Moore, for their own convenience and to suit their own purposes, and in violation of the contract, instead of hauling the timber to the ground or station of the railway company, left it at the place where I have before stated that it was, and this without the knowledge or assent of Ryan.

It also fully appears that Ryan had not any control of the work of hauling the timber as it proceeded, and that Patton obtained a balance of his contract price for the hauling from Kelly, with whom the money had been deposited by practising a deception.

The relationship of Ryan and Patton was not that of master and servant. They were independent contractors, Ryan having no power to control the operations of Patton. In such circumstances Ryan cannot, as I think, and, as I think, the authorities clearly shew, be held responsible for the improper and negligent acts of Patton in pretended performance of his contract. I am, therefore of the opinion that the defendants have not the right to recover over against Ryan and that the defendants should pay his (Ryan's) costs: *Smith's Master & Servant*, 4th ed., 353, 356; *Sadler v. Henlock* (1855), 4 E. & B. 570; *Saunders v. The Corporation of the City of Toronto* (1898), 29 O. R. 273; *Donovan v. Laing, etc., Syndicate*, [1893] 1 Q. B. 629.

ROBERTSON, J.:—

I think, with great respect, that the view taken by my learned brother Falconbridge in this case, in regard to the right of the plaintiffs to recover for the loss of the services of their child, who was killed while playing on the sidewalk, or public highway, cannot be supported, as the law is in this Province.

Judgment. I have considered with much care all the cases referred to in the argument by the respective counsel and several others, both English and American, as well as our own, and, keeping in view the wording of sec. 606 of ch. 223 R. S. O. (The Municipal Act), I do not see how it is possible to hold, in the face of the finding that the plaintiffs have sustained damages by the death of their child to the extent of \$400, that the defendant corporation are not "civilly responsible" for such damages, the same having been caused by reason of the default of the corporation in keeping the street at the place in question in repair.

I think the authorities shew conclusively that these plaintiffs had the right to the use of the highway for the purpose of allowing their child to play thereon.

There are both English and American cases which, owing to the peculiar state of the law in regard to roads and highways in England and in certain States of the Union, go to shew that for the purposes of play, a child or any person has no right to the use of the highway for that purpose, and cannot recover damages for an injury caused by the street being out of repair while at play; but our municipal law does not make any distinction.

The highway is *pro bono publico*, and so long as it is not obstructed unduly by the person using it, that person, whether adult or infant of tender years, has a right to such uses, and should he or she be injured while so using by reason of it being out of repair, the municipality whose duty it is under section 606 to keep it in repair, is responsible for all damages sustained by such person.

Take an almost every day occurrence: a child of six or seven years of age goes out on the sidewalk to trundle his hoop; in doing so he steps into a hole and breaks his leg. Would he not have a right of action for the injury received, and his parent for the expense he has been put to in nursing, and medical, and surgical services to bring about a cure? Or suppose the child is playing on the sidewalk with other children, and while in the act of walking, or skipping, or running about, an injury is sustained by

reason of the sidewalk being in disrepair, can it be said Judgment. that the child would not be entitled to maintain an action? Robertson, J. I think there is no doubt of it.

It follows, then, under what is called "Lord Campbell's Act," that the child having lost its life, by reason of the sidewalk being out of repair, an action is maintainable, and damages may be recovered in respect thereof for the benefit of the parent, etc., and in every such action the Judge or jury may give such damages as he or they think proportionate to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought, etc.

Now, in this case, the father of the boy who lost his life was a labouring man, had knowledge of gardening and raised vegetables, and was also engaged as a section man on the railway; he had at the time of the accident, six children at home; the deceased was in the seventh year of his age, a healthy, active, intelligent boy, did work for his father, weeded in the garden, dug potatoes, and such work about the place; carried vegetables in season up to the village and peddled them about for sale, and brought back the proceeds to his father.

This had been done by other boys of the family from the beginning, in fact it was necessary, in order to support the family, that every member of it should give a helping hand from the time he or they were capable of doing anything, and this was continued after the oldest got married and was doing for himself; the rule was for all to help the parents in their struggle through life.

Under all these circumstances, I think it is clear that the parents had a reasonable expectation that, had the deceased not been killed by reason of the negligence complained of, he would have been a help and assistance to his parents for many years to come. That being so, I think the learned Judge was not out of the way in estimating the loss which the plaintiffs sustained by reason of their child being taken off, at the early age of seven, at the sum of \$400. The amount should not be disturbed. There are numerous

Judgment. English cases which support a finding such as this on Robertson, J. evidence not more substantial as to expectations.

I have fully considered all the cases cited pro and con, and I have had the advantage of reading and considering the very full and able judgment of the learned Chancellor and my brother Ferguson, both of whom have entered very fully into the law governing the case, and it is quite unnecessary for me to elaborate further than to say that I am fully in accord with the conclusions they have come to, and agree, not only that judgment should be entered for the plaintiffs with full costs of the action, for \$400 damages against the defendants the corporation, but that the latter should pay the costs of the third party, there being no evidence whatever that he was a party to the obstruction of the street which 'so unfortunately caused the death of the plaintiffs' child.

G. A. B.

[DIVISIONAL COURT.]

REGINA V. KEMPEL ET AL.

Criminal Law—Extortion—Accusation—Information—Criminal Code, secs. 405, 558.

The word "accuses" in sec. 405 of the Criminal Code, providing for the punishment of any one who, with intent to extort or gain anything from any person, *accuses* that person or any other person of certain offences, includes the accusing of a person by laying an information under sec. 558 of the Code.

CROWN case reserved and stated under sec. 743 of *Statement* the Criminal Code by the senior Judge of the County Court of Bruce.

The prisoners were brought up for trial before the Judge in the County Judge's Criminal Court and there tried upon a charge that they "did unlawfully accuse one John Rumigh with having, on the 22nd day of May last at Mildmay, by force and against her will, feloniously ravished and carnally known one Philopena Kempel, a woman above the age of twelve years, with intent in so doing to extort a valuable security for money, and did compel the delivery thereof by the said John Rumigh to the said Ruhland and Kempel"—the prisoners—"in violation of section 405 of the Criminal Code, 1892."

Both the prisoners were convicted of the offence charged. Section 405 of the Criminal Code is as follows:

"Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to extort or gain anything from any person—

"(a) accuses or threatens to accuse either that person or any other person, whether the person accused or threatened with accusation is guilty or not, of

"(i) any offence punishable by law with death or imprisonment for seven years or more ;

"(ii) any assault with intent to commit a rape, or any attempt or endeavour to commit a rape, or any indecent assault. * * "

Statement. The Judge found upon the evidence that the prisoners, with the sole intent to extort something from Rumigh, laid an information for rape against him before one Kleist, a justice of the peace, had a warrant issued thereon, and caused Rumigh to be arrested by a constable and brought before Kleist; that the prisoners took two promissory notes from Rumigh while he was under arrest, and then called in Kleist, who, upon the prisoner Kempel saying that he had no witnesses, dismissed the charge with costs, which were paid by Rumigh; and that at the time of laying information Kempel probably believed that Rumigh had committed some offence against Kempel's wife, but not rape, and probably did not understand the legal meaning of the words in the information.

The question reserved for the consideration of the Court was:—

Does the "accusation" mentioned in sec. 405 include such an accusation as was made in this case before the justice of the peace?

The case was heard by a Divisional Court composed of BOYD, C., ROBERTSON and MEREDITH, JJ., on the 20th February, 1900.

David Robertson, for the prisoners. Section 405 does not apply to an accusation made by means of laying an information; it applies to threats. It is one of the sections contained in Part XXIX. of the Code, under the title "Robbery and Extortion," and is aimed at acts of robbery and extortion and not at the laying of an information. The laying of an information may be the basis of a conviction under sec. 152, which is in Part X., "Misleading Justice." Laying an information is in itself a lawful act: *Allen v. Flood*, [1898] A. C. at p. 123; *Regina v. Jones* (1847), 2 C. & K. 398; *Rex v. Dunkley* (1825), 1 Mood. C. C. 90; *Regina v. Walton* (1863), 9 Cox C. C. 268; *The Queen v. Tomlinson*, [1895] 1 Q. B. 706, 710. The menace must be such as to affect the mind of a reasonable man: *Rex v. Newland* (1796), 2 Leach C. C. 721. The

fact of the innocence or guilt of the present prosecutor of the charge laid against him is material: *Regina v. Richards* (1868), 11 Cox C. C. 43; and the Judge has found that Rumigh probably committed some offence. Argument:

J. R. Cartwright, Q. C., for the Crown. The provisions of the section should not be cut down: *The Queen v. Tomlinson*, [1895] 1 Q. B. 706. The word "accuse" should be given its ordinary meaning. See the word in the Standard Dictionary—"especially before a judicial officer or tribunal." See also Wharton's Law Lexicon, *sub verb*.

April 6, 1900. BOYD, C. :—

Section 405 of the Code provides for the punishment of one who, with intent to extort or gain anything for any person, accuses that person (whether the person accused is guilty or not) of any attempt to commit rape. To accuse, in ordinary parlance, in the form "to accuse (a person) of," means, to charge with the crime or fault of, etc. See Murray's Dictionary, *sub voce*. This may be done by laying an information against the person under sec. 558 of the Code. The person so charged is said to be the person *accused*. It is expressly laid down in the Am. & Eng. Encyc. of Law, 2nd ed., vol. 1, p. 481, *sub voce*, that the expression "to accuse" is used to denote the bringing of a charge against one before some Court or officer: see *People v. Braman* (1874), 30 Mich. 460. So in many English cases the expression "threatening to prosecute" is deemed equivalent to "threatening to accuse:" *Rex v. Abgood* (1826), 2 C. & P. 436. And, of course, "prosecuting" would be "accusing." See also *Rex v. Robinson* (1837), 2 M. & Rob. 14, where, "to accuse" is held to mean not only to accuse by course of law, but also to charge before any third person. See also *Rex v. Gill* (1827), 2 Lewin C. C. 305. The word "accuse" in this connection should receive a liberal interpretation: see *per Wills, J.*, in *The Queen v. Tomlinson*, [1895] 1 Q. B. at p. 710.

In response to the case reserved, it should be declared that the defendants are well convicted in the premises.

Judgment. ROBERTSON, J.:—

Meredith, J. I concur.

MEREDITH, J.:—

Anyone who lays "an information in writing and under oath," before a magistrate, against any person, obviously "accuses" that person of the offence charged against him in such information.

He "accuses" in the strictest literal meaning of that word.

Then, is there anything in the Criminal Code, or otherwise, to strip the word "accuses," in the section in question, of such meaning, to confine it to accusations made other than before a magistrate or some judicial tribunal?

Certainly, the Code lends no aid to an answer in the affirmative: quite the contrary: it abounds in the use of some form of the word "accuse" in reference to a prosecution before a magistrate and before judicial tribunals, starting in the very section in which the laying of such an information is provided for, by referring to the person against whom the information is laid as "such accused person."

And the very section in question provides for the case of threatening to accuse, which of course must include a threat to accuse before a magistrate or some judicial tribunal: the words are "accuses or threatens to accuse:" and words so nearly connected, in the same section, can hardly have different meanings—the one excluding, the other including, the laying of the information.

No case was cited that lends any aid to Mr. Robertson's contention.

Rex v. Robinson, 2 M. & Rob. 14, certainly does not. There the contention for the prisoner was that the word "accuse," in a case of threatening to accuse, imported a charge before a magistrate or some judicial tribunal only; the ruling was against that contention—that threatening to accuse meant threatening to charge before any third

person ; and so the case is frequently cited for the proposition that the words are not restricted to an accusation before a magistrate or a judicial tribunal, but include an accusation before any third person. Judgment.
Meredith, J.

I have found an observation, reported to have been made by a learned Judge at the Central Criminal Court, which, at first sight, seems to favour Mr. Robertson's contention. In *Regina v. Cooper* (1849), 3 Cox C. C. 547 at p. 551, Cresswell, J., is reported to have said : " We have nothing to do with the charge at the police station, or that made before the magistrate. He could not make any charge there to extort money. We must look to what the charge was in the first instance."

But those words must, I feel sure, have had reference to the facts of that particular case only, not to the meaning of the word.

Ordinarily a peace officer ought to be one of the last persons to go to with the intention of making an accusation to extort money, for if peace officers do their duty with honesty, and reasonable care, it ought to be a difficult, if not quite an impossible, thing to make effectual use of an actual criminal prosecution as a means of extortion. A criminal prosecution once begun ought to remove, very largely if not altogether, any hope of unlawful exaction of money or property by either the accusation of, or compounding, an offence.

But we have nothing to do with the facts of this case ; we have merely to answer the question of law reserved, which, in substance, is :—Can there, under any circumstances, be an accusation, within the meaning of the word " accuses " in sec. 405 of the Code, in the making of an accusation under, and for the purposes provided for in, sec. 558 ?

In my opinion, that question must be answered in the affirmative.

Conviction affirmed.

E. B. B.

REGINA EX REL. BURNHAM V. HAGERMAN & BEAMISH.

Municipal Corporations—Municipal Election—Qualification of Alderman—Title by Possession—"Partly Freehold and Partly Leasehold"—Meaning of.

In *quo warranto* proceedings under the Municipal Act, it is permissible to join two or more persons in the one motion only when the grounds of objection apply equally to both.

Where, therefore, the ground of objection was as to the qualification of two aldermen, which was separate and distinct, the joining of the two in one motion was held to be improper.

Property which had been in the undisputed possession of an elected candidate for fourteen years, he paying no rent nor giving any acknowledgment of title thereto, his title being admitted by the previous owner, who a few days after the election executed a conveyance thereof to him, was held to constitute a sufficient qualification.

The qualification which by section 75 of the Municipal Act is allowed to be "partly freehold and partly leasehold," is satisfied by half the amount being freehold and half leasehold.

Statement.

THIS was a motion in the nature of a *quo warranto*, to determine the validity of the election of C. A. Hagerman and W. E. Beamish, who had been declared duly elected to be aldermen for the town of Port Hope.

The relator was a candidate for the office of alderman at the same election, and had been defeated.

His objection to the election of Hagerman was that he had not the property qualification required by sec. 76 of R. S. O. ch. 223; and to the election of Beamish, that he had not the property qualification required by that Act.

The qualifications relied on by the two respondents, Hagerman and Beamish, were entirely separate and distinct properties, and there was no connection of any kind between them, beyond the fact that they were both elected upon the same day and for the same municipality.

The additional facts appear in the judgment of STREET, J., before whom the motion was argued on March 2nd, 1900.

Masten, for the relator.

H. J. Scott, Q.C., for Hagerman.

H. A. Ward, for Beamish.

March 5th, 1900. STREET, J. :—

Judgment.

Street, J.

A preliminary objection was taken by the respondents to their being joined in one motion, there being no ground asserted by the motion applying to both respondents.

I think the objection was well taken, and that it was manifestly improper to join both these cases in one motion. The old practice upon information in the nature of *quo warranto* proceeded upon the ground that an offence was charged and the proceedings against the respondents were in the nature of criminal proceedings. It would have been improper to charge two persons in one indictment each with an offence with which the other had nothing to do. It was only where there was a joint offence that such a course could be adopted; and this course is expressly sanctioned by section 225 of the Municipal Act, which allows the relator to proceed against two or more persons in one motion only in case the grounds of objection apply equally to them: See *Symmers v. Regem* (1776), Cowp. 489, 500; *King v. Warlow* (1813), 2 M. & Sel. 75.

I have, however, heard the motion upon the merits, pending a consideration of this preliminary objection.

I think both the respondents were properly qualified within the meaning of sec. 75 of the Municipal Act R. S. O. ch. 223.

Beamish was assessed for \$2,000 upon the last revised assessment roll as owner of a parcel of land of which he had been in peaceable and undisturbed possession since 1886, paying no rent and giving no acknowledgment of title. His title to it was admitted as complete by the former owner who in fact executed a conveyance to him at his request a few days after the election took place.

Hagerman's wife was assessed at \$800 as owner of a parcel of land, and at \$600 as tenant of another parcel of land. A mortgage, however, existed upon the first named property and upon some chattels assessed at \$500. The amount of the mortgage at the time of the election was \$665.

Judgment.

Street, J.

Following the principle of the decision of *Regina ex rel Ferris v. Speck* (1897), 28 O. R. 486, and the cases therein mentioned, I think that for the purposes of Hagerman's qualification the amount unpaid upon the mortgage should be proportioned between the land and the chattels in proportion to their assessed values which would make \$408 of the \$655 a charge to be deducted from the assessed value of the land and leave a surplus of \$392 as the assessed value of the land for which his wife appeared in the roll as owner, after deducting the encumbrance. The leasehold property for which she is assessed is free from any encumbrance. Section 75 of the Act allows the qualification to be "partly freehold and partly leasehold," and fixes the amount of the qualification in towns at \$600 freehold or \$1,200 leasehold.

There is, so far as I can find, no judicial interpretation of the meaning to be given to the provision that the qualification may be "partly freehold and partly leasehold," and the expression is certainly wanting in clearness. I do not think, however, that I am at liberty to treat it as having no meaning. I think it was intended to mean that a man having, for instance, one-half the freehold qualification and one-half the leasehold qualification should be treated as sufficiently qualified within the meaning of the section. Here Hagerman's qualification (through his wife which is sufficient under the Act) was \$392 freehold and \$600 leasehold, and is sufficient according to the interpretation I have placed upon the Act.

The motion must, therefore, upon all grounds be dismissed with costs.

G. F. H.

RYAN V. THE CORPORATION OF THE VILLAGE OF CARLETON PLACE.

Contract—Municipal Corporations—Erection of Municipal Buildings—Reference—Division of Questions of Law and Fact—By-law—Waiver of—Plans and Specifications—Incorporation into Contract.

On a reference of the matters in question in an action, unless the line between the questions of law and fact is clear and distinct, it is unadvisable to divide up the reference by first directing the evidence to the legal liability, leaving the quantum of damages and all other matters, to be afterwards disposed of.

An objection as to the want of proof of a by-law authorizing a contract for the erection of municipal buildings, raised for the first time at the close of a reference of the action to recover a balance alleged to be due, was overruled, where the existence of the contract was alleged in the statement of claim and defence, and the contract was identified by the mayor on the application for the reference by the defendants and made part of the defendants' material, and treated as the contract throughout the whole reference, and on which large sums of money had been paid under by-laws passed therefor.

Leave to amend so as to set up such objection refused.

Plans and specifications drawn for the erection of buildings—the specifications being divided under the headings "notes," "conditions," and "specifications,"—referred to in the contract, and initialled by the parties thereto, all bound up together and forming one document, must be read together as constituting one entire contract.

THIS was an appeal by the defendants from a referee's report, in an action by a contractor for the erection of a town and fire hall for the defendants.

Statement.

On February 16th, 1900, the appeal was argued. The only points on which it is necessary to give the arguments are the following:—

Watson, Q.C., and *Allen*, for the appellants. The plaintiff failed to prove a by-law of the corporation authorizing the entering into of the alleged contract, and so there is nothing to shew any obligation on the part of the defendants to pay anything under the contract. If it is necessary to have specially set it up, the defendants should be allowed to amend. Under Rule 312, the Court will allow an amendment at any time: *Williams v. Leonard* (1895),

Argument.

16 P.R. 544; (1896), 17 P.R. 73; (1896), 6 S.C.R. 406. In *Gold Medal Furniture Manufacturing Co. v. Lumbers* (1898), 29 O.R. 75, the whole frame of the action was changed after the case was closed and the evidence in. Then as to what constitutes the contract between the parties. The parties must be governed by the terms of the formal contract which cannot be controlled or varied by the terms of the specifications and conditions. These were preliminaries to the entering into of the contract; but the moment the contract was entered into, then the terms of the contract alone governed. The initialling of the specifications and conditions was merely for the purpose of identification.

Aylesworth, Q.C., and Labelle, contra. The defendants, by the course they have pursued, and the admissions made by them, have precluded themselves from now objecting to the absence of a by-law. They never alluded to the necessity of a by-law until the whole case was closed. This is not a case in which the Court will grant any indulgence, and the amendment, therefore, should not be allowed; but even if an amendment should be allowed, it would not avail the defendants, for other by-laws were proved which dispensed with the production of the by-law in question, but no by-law at all was necessary, as the contract has been executed: *Pim v. Municipality of Ontario* (1859), 9 C.P. 304: *Bernardin v. Municipality of North Dufferin* (1891), 19 S.C.R. 581. Then as to the other point. The language used in the contract and in the specifications and conditions, clearly shew that their terms were incorporated in and made part of the contract.

March 15th, 1900. STREET, J. :—

The plaintiff is a contractor and the defendants are a municipal corporation.

The plaintiff, in his statement of claim, alleges that "on or about the 24th day of October, A.D., 1895, by contract in writing, the plaintiff and defendants entered into a

contract whereby the said plaintiff agreed, in consideration of \$23,320, to execute and perform the whole of the several trades required in the erection and completion of the town and fire hall for said defendants, on lands specified in said contract according to the plan drawn and specifications asked for said works by George W. King, architect, etc.

Judgment.

Street, J.

The action is brought for an alleged balance due, according to the terms of the contract, for extras done by direction of the architect, and for damages arising from breaches by the defendants.

The defendants, by their statement of defence, deny the allegations of "the statement of claim, except in so far as the same may be hereinafter expressly admitted;" and they say, as to the causes of action set forth, "that an instrument in writing, containing the whole agreement between the parties, and to which the defendants crave leave to refer at the trial hereof, was executed by the plaintiff and the defendants; and the defendants state that they have performed, in accordance with the said agreement, all things required to be done by them." They then proceed to deny in detail all liability; and counter-claim for damages and over payments.

On the 14th of January, 1898, upon the application of the defendants, an order was made by the Master in Chambers "that the matters in question in this action be referred to W. S. Senkler, Esq., at Perth, as special referee, pursuant to section 29 of the Arbitration Act."

The defendants' application for this order was supported by an affidavit of their solicitor, who produced as an exhibit the duplicate original of the contract sued on, stating it to be the contract subsisting between the plaintiff and the defendants, under and by virtue of which the plaintiff erected a town and fire hall at Carleton Place, out of which a dispute has arisen between them, as to the amount due the plaintiff for damages and extras; and stating that he, the deponent, is a subscribing witness to the contract. The application was further supported by

Judgment. an affidavit of the mayor of Carleton Place identifying
Street, J. the contract.

The parties attended before the referee in accordance with the order, and a great deal of evidence was taken. A contract in writing, dated the 24th of October, 1895, purporting to be under the hand and seal of the plaintiff, and under the corporate seal of the defendants, and to be signed by the mayor, and witnessed by the defendants' solicitor, was put in evidence by the plaintiff at the opening of the reference without objection, and was referred to as "the contract" throughout the evidence.

A document endorsed as "specifications" was also given in evidence, and is numbered as Exhibit No. 32. According to the evidence this document was before the parties at the time the contract was signed, and is endorsed :

"These are the specifications referred to in agreement made the 24th of October, 1895, between Matthew Ryan, therein called the contractor, and the corporation of Carleton Place, therein called the corporation ;

(Sd.) M. RYAN.

(Sd.) D. CRAM, Mayor,"

and each sheet is initialled by the plaintiff and the mayor.

This document is divided under three heads, "Notes," "Conditions," and "Specifications" ; but all are bound together, and endorsed and initialled as above stated ; and it is evident upon their face that it was intended that they should all be taken along with the plan and contract when signed, to be read together, for it is provided as the first "condition," that "the contract, as well as these notes, conditions, specifications and plans, are to be considered as one agreement."

When the matter was opened before the referee, "it was agreed between the counsel that the reference should be divided into two parts, and that, in the first instance, the evidence should be directed to the question of legal liability, leaving the quantum and all other matters referred, to be disposed of later, and that at the close of the first part of the reference a separate report should be

made on that part of said reference, all other matters to be covered subsequently by a final and other report." Judgment.
Street, J.

This arrangement was, no doubt, intended by the parties to save expense, but its effect will be largely to increase it. Experience has shewn that, except in the very simplest cases, where there is a clear line between the questions of law and those of fact, and the determination of one class puts an end to all contest over the other, it is the shortest way as well as the cheapest in the end to try altogether, and not to expose the parties to successive appeals upon each branch. But to attempt a separation between the law and the facts in a case such as the present, bristling with questions both of law and fact, was, I should have thought on the face of it, a hopeless task from the beginning. The result of the attempt is a report intended to present the question of legal liability, apart from the quantum and all other matters, but which, excepting upon two points, I have found it impossible to deal with. Except upon these two points, the report consists partly of statements of evidence, and partly of inconclusive and argumentative findings of facts, and I should, in dealing with it, be required to lay down broad and general statements of law without accurate or complete evidence of the facts to which it is intended they are to be applied when the second branch of the enquiry comes to be taken up by the referee, and the findings upon the legal questions are intended to be applied. As an example, I refer to the third paragraph of the report which is the subject of the eighth ground of appeal. In that finding the referee states his interpretation of the meaning to be placed upon the word "extra" as used in the specifications in reference to certain excavation below the zero line.

Upon the argument before me, upon this ground of appeal, it was admitted that no evidence had been taken as to whether there was in fact, any such excavation below the zero line, and the instructions of counsel upon that fact were diametrically in conflict. It might therefore happen that after this question had been discussed by

Judgment. various courts of appeal, a short enquiry into the facts
Street, J. would shew that there was no such excavation below the zero line, and that the question had, therefore, no bearing upon the rights of the parties.

For these reasons, therefore, I directed at the argument that all matters should go back to the referee, subject only to the determination of two questions raised by the appeal which I reserved, and which I now proceed to dispose of.

The first is against the finding of the referee that the due execution of the contract on the part of the defendants was proved.

The whole objection of the defendants to this finding is that no evidence was given by the plaintiff, that a by-law of the corporation authorizing its execution had been passed.

I have stated above at some length the admissions in the pleadings of the defendants as to the existence of a contract executed by them; these admissions are to be read in connection with the plaintiff's statement of the existence of a contract bearing date the 24th of October, 1895, and with the production at the reference, by the plaintiff of a document bearing that date and its admission as evidence without objection by the defendants.

The admission in the pleadings is in effect: "I admit that there was a contract duly executed by me for the buildings as alleged by you, but I want to see it." Thereupon it is produced and put in without objection; it is referred to by both parties throughout the reference as the contract between them; it is shewn that the defendants have paid thousands of dollars for work done under it, out of money authorized to be raised for the purpose by two by-laws of the corporation; and no objection is raised to it until the evidence has all been closed and the argument before the referee is proceeding. Under these circumstances, I think the referee was right in holding that the document had been properly and sufficiently proved: *Barnard v. Wieland* (1882), 30 W.R. 947. And as the objection to it

Judgment.

Street, J.

is, under the circumstances, purely technical, I do not think the defendants should now be allowed, by amending their pleadings as they asked me to allow them to do, to withdraw their admissions, and to deny that they ever entered into the contract.

The defendants' appeal, upon this ground, will, therefore be dismissed.

The second question is raised by the defendants' appeal against the second paragraph of the report, in which the referee determines that the plans and specifications (including the notes and conditions), are not in fact, a part of the contract. As I understand his meaning, it is that the work is intended to be done in the manner described in the specifications, and with the material required by them; but that beyond this, the contract is not affected by anything to be found in them, or in the "notes" and "conditions" attached to them. He founds his opinion in this regard upon the fact that in two or three instances, to which he refers, he considers the specifications and the contract itself are inconsistent or contradictory. It appears from the evidence that the specifications (including the notes and conditions), were prepared first; then tenders were invited for the work to be done according to the specifications; that then some time passed before the contract was prepared, and that finally the parties met and executed the contract and initialled the specifications, as I have above stated. The plaintiff insists that what he did was merely to identify the specifications as those referred to in the contract, and that he did not intend to incorporate everything in them.

In my opinion the plaintiff must be bound by the language of the first paragraph of the "conditions" which form part of the specifications and are referred to in the contract, with the result that the contract, specifications, conditions and notes and the plan, all form one contract binding upon both parties.

The construction to be placed upon parts of this whole contract, where one part of it appears to contradict

Judgment.
Street, J.

another part of it, is quite another question, and one which does not here arise.

The appeal upon this point must, therefore, be allowed.

Subject to these determinations the report is referred back to the referee, in order that he may take all the evidence and make his final report in the usual manner upon the matters referred to him.

As the miscarriage which has taken place has occurred by reason of a consent and request of both parties to the litigation, I think the costs of the whole appeal should be costs in the cause.

G. F. H.

[DIVISIONAL COURT.]

COOLIDGE V. NELSON.

Registry Laws—Will—Annuity—Unregistered Agreement Creating Charge on Land—Notice—Registry Act, R.S.O. ch. 136, sec. 87.

A testator by his will directed his executors to pay his widow an annuity for the support and maintenance of one of his sons until he became of age; and he also directed that if there were not sufficient funds therefor, it was to be a charge on separate parcels of land severally devised to three of his other sons. There were sufficient funds in the executors' hands for the payment of the annuity, but by an agreement, for valuable consideration, made between the widow and the devisees of the lands, it was agreed that the annuity should not be paid out of the moneys but should be a charge upon the lands, the intention being that the moneys should be kept in hand for the payment of a legacy payable to the first named son on his attaining his majority. A sale was subsequently made by one of the sons of the parcel of land devised to him, the purchaser being informed as to an agreement having been entered into with reference to the annuity, but being at the same time told that it in no way affected the land, merely creating a personal obligation to pay the annuity, and he made no further inquiry with regard to it:—

Held, that the purchaser could not be deemed to have purchased the land with actual notice of the contents of the agreement so as to be affected thereby.

Statement.

THIS was an action brought by Ruth Coolidge and Edwin Eugene Coolidge, the widow and son of Ira A. Coolidge, deceased, against Urias W. Nelson, claiming that certain lands, which, under Ira A. Coolidge's will, had been devised to David Barker Coolidge, were charged and encumbered with an annuity in their favour.

The testator died on the 16th October, 1889, and by his will, dated the 5th April, 1888, he devised certain lands to his sons Charles Henry Wilcott Coolidge, Alywin Benjamin Coolidge and David Barker Coolidge. Statement.

The testator then by the 10th and 11th paragraphs of his will declared :—

“ 10. I will and bequeath to my said son, Edwin Eugene, eight shares of stock in the Standard Bank of Canada, to be given to him when he shall attain the age of twenty-one years; and in the meantime I direct my executors to pay to my said wife Ruth, the sum of \$60 annually for ten years, and after that \$120 annually until my said son shall attain the age of twenty-one years, together with the dividends as they may be received on said bank stock, for the support, maintenance and education of my said son Edwin Eugene. But in case there be not sufficient funds in the hands of my executors to pay said annuity, I will and direct that each of my said sons Charles Henry Wilcott, Alywin Benjamin and David Barker to pay an equal share of any deficiency to make up such annuity; and this I make a charge and encumbrance upon the lands devised to my said sons as aforesaid respectively.”

“ 11. I will and bequeath to my said son, Edwin Eugene, the sum of \$2,600, to be paid to him without interest when he shall attain the age of twenty-one years. Provided that in case there be not sufficient funds in the hands of my executors to pay said sums at the time aforesaid I will and direct that my said son, Alywin Benjamin, shall pay and make up one-quarter of such deficiency, and my son Charles Henry Wilcott shall pay and make up the remaining three-quarters thereof, and I make the payment of such deficiency a charge and encumbrance upon the lands hereinbefore devised to my said sons, Alywin Benjamin and Charles Wilcott, respectively. Provided that if my said son, Edwin Eugene, should die before attaining the age of twenty-one years without lawful issue surviving him the property and legacies hereinbefore willed to him shall be equally divided among such of my children as

Statement. may then be living, and the children of such as may be dead *per stirpes*."

He then made provision for the widow, and that such provision, if accepted by her, should be in lieu of dower.

On the 28th December, 1889, the following agreement was entered into between Ruth Coolidge of the first part and Alywin B. Coolidge, David Barker Coolidge and Ruth Coolidge, executors under the said will, and Charles Wilcott Coolidge of the second part.

"Whereas by the last will and testament of the said Ira A. Coolidge, dated the 5th day of April, 1888, the said testator made certain devises and bequests to the said Ruth Coolidge, which said devises and bequests were by the said will given in lieu of dower which she might have in the lands of the said Ira A. Coolidge. And whereas the said Ruth Coolidge having carefully perused the said will has agreed to accept, and does hereby accept, the provisions in the said will in her favour in lieu of all dower or other claims she may have against the real estate of the said Ira A. Coolidge as his widow. And whereas there is some doubt as to the construction of that portion of paragraph 10 of the said will so far as it relates to the payment of said annuity therein mentioned; and the said Alywin B. Coolidge, David B. Coolidge and Charles Henry Wilcott Coolidge, hereby agree with the said Ruth Coolidge upon the following construction of that portion of the said will, namely, that the said annuity is and shall be payable by the said Alywin B. Coolidge, David B. Coolidge, and Charles Henry Wilcott Coolidge in equal portions, and that the same shall not be payable out of or deducted from the surplus moneys now or hereafter in the hands of the said executors; and the said Ruth Coolidge makes the election aforesaid on this construction of the said portion of the said will."

On the 9th of April, 1897, David B. Coolidge sold and conveyed the lands and premises, so devised to him, to the defendant Urias W. Nelson, who was his brother-in-law, as to which it was claimed that the defendant had, before

the time of the purchase full and actual notice and knowledge of the agreement. Statement.

The plaintiffs claimed that the lands as purchased by the defendant were charged and encumbered with the said annuity, and that there were five annual payments of \$20 each due, making \$100, and interest on overdue amounts amounting to \$15.85, making in all \$115.85.

The action was tried before FALCONBRIDGE, J., without a jury at Picton, at the Autumn Assizes of 1899.

Alcorn, Q.C., and J. R. Brown, for the plaintiffs.

C. H. Widdifield, and Young, for the defendants.

Deroche, Q. C., for David B. Coolidge, who had been added as a third party defendant.

At the conclusion of the case the learned Judge delivered the following judgment:

FALCONBRIDGE, J.:—

I am of the opinion that the annuity is a charge on the land, both by application of the cases which have been cited to me, and under the express terms of the will itself.

I think it has been clearly made out there is a deficiency; that the amount of \$1,783 is not sufficient to answer the charges against the estate. Leaving out any question of the ability of the estate to satisfy all or any alleged claims against it, or the expenses of winding up the estate, the object of the legacy in question is to provide for the maintenance and education of the infant son, the child of the testator, by money, the other sons were provided for by having secured to them valuable farm properties, and the daughters were provided for in other ways.

I find that there is a deficiency, which, I find, existed to the knowledge of the defendants and their solicitor.

The will expressly creates a charge on the land under the finding, and his decree will be to that effect.

Judgment. I find, as a fact, that the purchaser had actual knowledge of the agreement mentioned in the pleadings. He
Falconbridge, knew, on his own statement, that some agreement existed.
J. He had a conversation with D. B. Coolidge, who professed to know its contents, and who told him what was not in it; but he (the purchaser) carefully refrained from enquiring what were its provisions. The agreement, I think further, does not affect the position of the plaintiff under the will. Its object is to define the rights of the parties; it defines the position of the widow, and puts an end to the dispute and controversy which existed about her claim that she should be paid interest on the balance in the bank as well as the annuity. Now, the infant was not a party to that. It is not mentioned in the agreement that it was made for him or for his benefit. That is immaterial, so far as the situation of the case is concerned, and the view I take of it; but it has a bearing on the question of novation. I do not think there was any novation in any sense of the word. I think there was a clear definition by the new contract, and no release of the charge, particularly in the case of the infant, whose security his mother had no right to release so as to bind him.

I am, therefore, of opinion the plaintiff is entitled to succeed.

There will be an order for arrears of interest, which I declare a charge upon the land and on the respective interests.

As between the defendant and the third party, D. B. Coolidge, it is different. The defendant had no right to bring the third party before the Court, because the will, as a registered instrument, he had notice of; and it was not an encumbrance created by the third party; therefore the third party should go free. Ordinarily, where a party brings an action having no real claim, and the defendant brings a third party before the Court, then the defendant should pay his costs. There will be no costs, as against the defendant, for the third party.

From this judgment the defendant, Urias W. Nelson, **Argument.** appealed.

On March 12th, 1900, before a Divisional Court composed of BOYD, C., FERGUSON and ROBERTSON, JJ., the appeal was argued.

Shepley, Q.C., and C. H. Widdifield, for the appellants. No charge is created in favour of the plaintiffs Ruth or Eugene. The only charge that affects the defendant is under clause 10 of the will, and this is only to take effect in case of a deficiency in the assets, and there was no deficiency. It is, however, claimed that the effect of the agreement of the 28th December, 1899, was that a charge was put upon the lands, and that the defendant had notice of it. The agreement, however, did not have the effect of imposing such a charge, but merely created a personal obligation. If it created a charge on the land, it should, in order to bind the defendant, have been registered, or actual notice of its contents brought home to the defendant. Section 2 of the Registry Act, R. S. O. ch. 136, defines what an "instrument" shall include; section 38 points out what instruments can be registered; and section 87 enacts that an unregistered instrument is not to affect a purchaser unless he has actual notice of it. Then 62 Vict., 2nd sess., ch. 16, sec. 1 (O.), provides for the registration on the general registry of such a document as this. Actual notice must be shewn; it is not sufficient to shew constructive notice; and the actual notice must be such that if not acted on it would amount to fraud. But, even if constructive notice were sufficient, there is no such notice here. There is no doubt that the defendant was told there was an agreement or document of some kind, but at the same time he was told that its effect was that the charge on the land was entirely removed: *Ross v. Hunter* (1881), 7 S. C. R. 289; *Bauman v. James* (1868), L. R. 3 Ch. 508; *Shaw v. Foster* (1872), L. R. 5 H. L. 321; *Patman v. Harland* (1881), 17 Ch. D. 353, 356, 357; *Williams v.*

Argument. *Williams* (1881), 17 Ch. D. 437, 442, 443; *The Emilien Marie* (1875), 44 L. J. N. S. Ad. 9, 15; *Rose v. Peterkin* (1884), 13 S. C. R. 677; *Hollywood v. Waters* (1857), 6 Gr. 329; *Lee v. Clutton* (1875), 45 L. J. N. S. Ch. 43; *Sherboneau v. Jeffs* (1869), 15 Gr. 574; *Wyatt v. Barwell* (1815), 19 Ves. 435; *S. C.*, 24 W. R. 106; *New Brunswick R. W. Co. v. Kelly* (1896), 26 S. C. R. 341. The learned Judge at the trial should not have discharged the third party, for if the Court should hold that the judgment is properly entered against the defendant, he is entitled to indemnity over against him.

Aylesworth, Q.C., contra. The widow refused to allow the money in hand to be applied in payment of the annuity, and as she had a right to dower, the agreement was entered into, whereby, in consideration of releasing her dower, it was agreed that the moneys were not to be applied in payment of the annuity. Therefore the effect of the agreement was that there was no money on hand to pay this annuity, and so under the terms of the will there was a deficiency, so as to make the annuity a charge upon the lands. When, therefore, David sold to the defendant the lands were so charged, and the defendant purchased with notice of the charge. He was told there was a document relating to the matter. It was, therefore, his duty to inquire and ascertain what the contents of the document were, and he cannot now claim that by reason of his own neglect in omitting to do so, he is not to be held responsible. The learned Judge who tried the case came to the conclusion that the defendant wilfully abstained from inquiry; in fact that he shut his eyes so as not to be able to ascertain its contents, and so, as he thought, to be freed from its effect. Apart, however, altogether from the effect of the agreement there was a deficiency and the charge on the lands become operative. This was not such a document as required to be registered. No lands were mentioned in it, and therefore it does not come within the Registry Act, and the notice must be considered apart from the Act. But, even if it required

to be registered, and came within the Act, there was actual notice: *Severn v. McLellan* (1872), 19 Gr. 220; *Rose v. Peterkin* (1884), 13 S. C. R. 677; *McLennan v. McDonald* (1891), 18 Gr. 502; *Howard v. Chaffers* (1863), 2 Dr. & Sm. 236; *Bank of Ireland v. McCarthy*, [1898] A. C. 181. Argument.

March 17th, 1900. BOYD, C.:—

This action is by the widow and child (Eugene) of Ira Coolidge to recover payment of an annuity out of the land held by the defendant. By the will his executors were to pay the widow \$60 for ten years, and thereafter \$120 annually till Eugene attains twenty-one, for the support, maintenance and education of the son. But in case there is not sufficient funds in the hands of the executors to pay said annuity the will directs that the payments be charged equally upon lands devised to his three sons, Charles, Alywin and David. Eugene is not yet of age, and the executors have some \$1,700 or \$1,800 of estate moneys in hand which in due course of administration are ample to pay this annuity.

David Barker sold and conveyed his land to the defendant Nelson in 1897; and, if the transaction rests as above stated, the right of the plaintiffs is to call upon the executors to pay the annuity out of the funds in hand to the exoneration of the defendant's land. In this aspect the action is misconceived and should fail.

But the contest arises in respect of a dealing between the widow and the three sons upon whose lands this annuity is charged. By agreement of December, 1889, next year after testator's death, it was agreed for valid consideration that the annuity should be paid by the three sons in equal parts and that the same should not be payable out of or deducted from the surplus money, now or hereafter in the hands of the executor.

The intention was to save up this money in hand for the satisfaction of a legacy of \$2,600 payable to Eugene

Judgment. upon his attaining twenty-one years. This agreement was
Boyd, C. not registered, was retained in the hands of the solicitor Widdifield, but it is alleged that the defendant was affected with actual notice of it and its contents before he obtained and registered his conveyance.

This agreement affected the land indirectly not by express mention but by legal intendment and might have been registered. By the will this annuity is charged upon the land after the available personal estate is exhausted. By the agreement the personal estate is diverted from this application so that the land becomes directly charged, if the legatees fail personally in paying their proportions of the annuity. If actual notice of this arrangement is not brought home to the defendant so that it takes priority over his conveyance, then the judgment should be in his favour.

By the Registry Act, sec. 87, after patent issued, every instrument affecting lands shall be adjudged fraudulent and void against any subsequent purchaser for valuable consideration without actual notice unless such instrument is registered, etc.

After going very carefully through the evidence, including the examination of the defendant, I am satisfied that the proof falls far short of actual notice to the purchaser and at most amounts to constructive notice.

He was told there was a written agreement between the sons and Mrs. Coolidge as to this annuity, but he did not see it nor was he told where it was. He was also told that there was money in hand, some \$1,700 or \$1,800, and that the annuity was not paid out of this because of the agreement whereby it was to be paid out of the produce of the land or in any way that the sons could pay it, the same as a note.

While he was told that there was an agreement that the sons should pay the annuity as a present engagement, he was not informed that the agreement was so drawn as to exonerate the money in hand or personal funds of the

estate, and to make these applicable to the later accruing legacy to Eugene. He was also assured affirmatively by Alywin and David, that there was nothing in the agreement to make it binding on the land, — (i.e., to make the payments undertaken by them an absolute and direct charge on the land). Thus then he may have inferred or have known that the annuity was not in fact being paid out of the money in the bank because of the new agreement of the sons to pay it as a personal liability of their own.

Judgment.

Boyd, C.

According to McGillivray's evidence called for the plaintiff, the defendant understood that the effect of this new agreement was to create a new and distinct personal liability to pay on the part of the sons and work a release of the charge on the lands. But as to the vital point of the writing, that whereby the money in hand or in the bank was to be protected from being applied to meet the current annuity, and by which the stipulations of the registered will were altered as between the contracting parties, he had not the slightest intimation.

In the result then and protected by the Registry Act, the defendant purchased subject to the charges and provisions of the will, but not subject to the alteration propounded by this unregistered agreement.

There is nothing to shew that he knew the real contents of the document, nor that he abstained from making inquiries, though that is not now perhaps material. Even before the change of our law so as to call for "actual notice" the decisions were that the evidence of notice to impeach a duly registered conveyance for value should be so cogent as to amount to actual fraud: *Jolland v. Stainbridge* (1797), 3 Ves. 478; *McMaster v. Phipps* (1855), 5 Gr. 253, at p. 257; *Ferrass v. McDonald* (1855), *ib.* 310; 36 Vict. ch. 17, sec. 7 (1873); *New Brunswick R. W. Co. v. Kelly* (1896), 23 S. C. R. 341.

No imputation rests on the conduct of the defendant and he is entitled to have the action dismissed with costs.

Judgment. FERGUSON, J. :—

Ferguson, J.

The facts of the case are sufficiently stated in the judgment of the Chancellor.

I think the document called the agreement was an instrument affecting the land. It had regard to the payment of the annuity out of a fund that was applicable to the payment of the legacy charged upon the land before the land could be resorted to for satisfaction of the legacy and so diminishing that fund that the land might become directly and immediately liable in respect of the legacy. The agreement, as an "instrument," in this way, indirectly affected the land, though the land was not mentioned or described in it.

That agreement might, as I think, have been registered under the provisions of sections two and twenty-nine of the "Registry Act," in the "general registry book," but it was not registered at all, at the time of the purchase by the defendant, nor at the time of the registration of the conveyance to him.

The defendant was told of the existence of the agreement, but was at the same time told that it did not affect the land that he was purchasing. The defendant did not follow up the information he had received respecting the agreement by obtaining an inspection of it; but there does not appear to be any reason or ground on which any evil or fraudulent intent can be imputed to him for not doing so, and, as it appears to me, the highest notice that can possibly be imputed to the defendant at the time he registered his conveyance, is constructive notice, if even this can be so imputed. It seems to me, clear beyond doubt, that at this time the defendant had not actual notice of the agreement. The defendant made his purchase, paid the purchase money, procured his conveyance, and registered the same without actual notice of this agreement. The lands that he purchased are (and this is not disputed) liable to the charge imposed upon them by the will, but not liable to any greater or further extent by

reason of the agreement, or anything done under the provisions of it. It is plain from the provisions of the will and the amount of money shewn to be in the hands of the executors, that, but for the agreement and the diversion of moneys pursuant to the provisions of it, there would be a fund primarily liable to satisfy the legacy entirely sufficient for the purpose, and, according to the provisions of the will, the defendant's lands are not liable so long as such fund so exists. Judgment.
Ferguson, J.

I am, therefore, of the opinion that this appeal should be allowed, and the action dismissed with costs.

ROBERTSON, J. :—

After a very careful perusal of the evidence, I have come to the conclusion that the defendant had not "actual" notice of the agreement in question, the most that can be said of it is that he had constructive notice; but taking all the circumstances into account, as to what he was told what the effect of the agreement was, I do not think he was bound to enquire further in order to come to a proper conclusion as to the real effect of the agreement. He seems to have acted in good faith all through.

I therefore agree with the learned Chancellor and my learned brother Ferguson, that the appeal should be allowed, and the action dismissed.

G. F. H.

MOSHIER V. KEENAN ET AL.

Sale of Goods—R. S. O. ch. 150—Factors Act—“Agent”—“Entrusted”—Innocent Purchaser.

The word “agent” referred to in R. S. O. (1897) ch. 150, “An Act respecting contracts in relation to goods entrusted to agents” means one who is entrusted with the possession as agent in a mercantile transaction for the sale, or for an object connected with the sale of the property.

And an agent who has obtained possession of certain lumber from the master of a vessel without authority from the owner was :—

Held, not to have been *entrusted* with the possession, and that the owner was entitled to recover the value of the lumber from a *bond fide* purchaser from, and who had paid the agent.

Statement. THIS was an action brought to recover the value of certain lumber purchased by the defendants from one Foster who had obtained possession of it from the plaintiff under the following circumstances.

The plaintiff had been in communication with Messrs. Cooke & Scott, a firm of lumber merchants, with the object of selling them some lumber, and they sent their agent, William Foster, up to Lion’s Head, the place where the lumber was, to inspect and measure it. That lumber having been shipped, Foster undertook, on behalf of Cooke & Scott, to purchase certain other lumber which was shipped on a vessel from Lion’s Head to Owen Sound with instructions to the master of the vessel to deliver it at Owen Sound for the plaintiff, and that Foster would load it on the cars there to be sent on. Before it arrived at Owen Sound, the plaintiff had been advised that Cooke & Scott did not require and would not purchase the lumber. Foster, without further instructions from the plaintiff, then paid the balance of the freight due to the master of the vessel, obtained possession of the lumber, sold it to the defendants, and failed to pay the plaintiff. This action was then brought against the purchasers for the value of the lumber, and it was tried at Owen Sound on March 6th, 1900, before BOYD, C., without a jury,

J. M. Kilbourn, for the plaintiff, contended that the evidence shewed no privity of contract between the plaintiff and defendant, and no knowledge on the part of the plaintiff of what Foster was doing or did until the defendants had actually paid Foster for the lumber, and as there was no fraud, representation or concealment on the part of the plaintiff, there was, therefore, no estoppel, and that the plaintiff's evidence supported by the documentary proofs quite negatived Foster's pretence of a conditional purchase and that Foster was not an agent intrusted with the possession, etc., within the meaning of R. S. O. ch. 150, and cited *Bush v. Fry* (1888), 15 O. R., at p. 126; *Cole v. The North-Western Bank* (1874), L. R. 9 C. P. 470; *The Mayor, etc., of the Staple of England v. The Governor and Company of the Bank of England* (1887), 21 Q. B. D. 160; *Johnson v. The Credit Lyonnais* (1877), 2 C. P. D. 224; 3 C. P. D. 32; *Agricultural Savings & Loan Association v. Federal Bank* (1880), 45 U. C. R. 214; (1881), 6 A. R. 192; *Fuentes v. Montis* (1868), L. R. 3 C. P. 268; *Arnold v. The Cheque Bank* (1876), 1 C. P. D. 578; *M'Kenzie v. British Linen Co.* (1881), 6 App. Cas. 82; *McGee v. Kane* (1887), 14 O. R. 226; Am. & Eng. Encyc. of Law, 2nd ed., vol. 11, pp. 422, 433.

W. J. Hatton, for the defendants, contended that the evidence disclosed a conditional sale to Foster in the event of Cooke & Scott not taking the lumber; that Foster had possession with the plaintiff's consent, and was entrusted with the lumber as an agent, and that plaintiff was therefore bound by the sale so made by Foster, and distinguished *Bush v. Fry*, *supra*, and that in any event the plaintiff's knowledge and conduct estopped him, and cited *Gunn v. Gillespie* (1845), 2 U. C. R. 151; *Brady v. Todd* (1861), 7 Jur. N. S. 827; *Pickering v. Busk* (1812), 15 East 38.

Kilbourn, in reply.

March 15th, 1900. BOYD, C.:—

The Act of Parliament relied on by the defendants R. S. O. ch. 150, is entitled "An Act respecting contracts in

Judgment. relation to goods entrusted to agents," and the origin of
Boyd, C. it in Canada can be traced back to 10 & 11 Vict. ch. 10 (1847), a statute obviously founded on and in great part repeating the provisions of the English Factors Act, 5 & 6 Vict. ch. 39 (1842). Though in its present form it does not contain the word "factor"—that term does appear in the original preamble both in Canada and in England.

It is now classed in the consolidated revision under the general head of mercantile law and I have no doubt that the English decisions are in point upon the construction of the present Ontario statute—as was indeed acted on in *Bush v. Fry* (1887), 15 O. R. 122.

That being so, a limited meaning is to be given to the "agent" therein referred to. It is not every person who may act for another in any matter relating to the personal property in question, who may have the possession of that property. The agent must be one who is entrusted with the possession as agent in a mercantile transaction for the sale, or for an object connected with the sale of the property. These various requirements must unite in order to invoke the benefit of this legislation: see *per* Willes, J., in *Fuentes v. Montis* (1868), L. R. 3 C. P., at pp. 278, 279, affirmed in Exchequer Chamber, L. R. 4 C. P., at p. 96.

The present case may be disposed of adversely to the defendant upon the controlling word "entrusted." That was much discussed in *Phillips v. Huth* (1840), 6 M. & W. 572. It imports that confidence has been reposed in the agent by the principal—the owner of the goods—and that the possession of the goods at the particular time and in the particular way they are in the hands of the agent is intended and contemplated by the owner. If the possession has been obtained in violation of instructions or by means of a breach of faith—that is not an "entrusted" possession within the provisions of the Act. As it is expressed by Chief Justice Tindal in giving the opinion of the Judges to the House of Lords in *Hatfield v. Phillips* (1845), 12 C. & F., at p. 360, "where the owner of the goods did not deliver, or cause to be delivered to the

factor, (the possession of) the document in question, but, on the contrary, the factor obtained it for himself, it should appear that he obtained the possession of it under circumstances which shew the owner of the goods intended him to have such possession." See also *per* Lord Justice Bramwell in *Thompson v. The Credit Lyonnais Co.* (1877), 3 C. P. D., at p. 43.

Judgment
Boyd, G.

It may be that the agent Foster from whom the defendants purchased the lumber was not a mercantile agent to sell within the meaning of the Act, but was to have possession merely for the purpose of loading the stuff when sold. I do not dwell upon the evidence on this head, but assume that he was such agent and in actual possession of the lumber so that section 3 applies; then the onus of proof is cast upon the plaintiff. And I think he satisfied that burden by shewing that the possession obtained by the agent Foster was not a possession entrusted to him by the owner.

Apart from the conflict of individual testimony, there is much written material that makes entirely in favour of the plaintiff's version.

I think the plaintiff's account of the transaction, squaring as it does with the correspondence, is preferable to that of Foster. This lumber was sent down from Lion's Head to Owen Sound about 1st December, 1899, by the "Mary Gordon"—shipped by the plaintiff to himself with the understanding that Foster was to load on cars for Cooke & Scott—the prospective buyers. Before the vessel arrived the plaintiff was advised that Cooke & Scott would not purchase it, and on 4th December the plaintiff wrote Foster that as Cooke & Scott would not take it he was not to load it on the cars. The plaintiff added "I will try and sell to Murphy," and he did write Murphy on the same day.

Foster, however, when the vessel arrived about the 6th December, prevailed on the captain to take payment of the unpaid balance of the freight from him and so obtained possession of the lumber. The plaintiff said that he paid

Judgment.

Boyd, C.

part of the freight and was coming down to Owen Sound to pay the rest as the captain was to draw on him through the bank for it. The captain says that the lumber was to be carried by him to the Canadian Pacific Railway dock to the plaintiff's order, though there was no shipping bill, but he thought it made no difference who paid the rest of the freight so long as all was square.

On the 6th Foster proceeded to sell to the defendant, and was paid on that day \$50, and the balance of the price on the 13th December.

Foster advised the plaintiff on the 7th December, that he had received his letter of the 4th, but had sold to Keenan "They load in a day or two and will send you the money for it," and on the next day Foster wrote "I expect in a few days to send you the price of the bass and birch" (*i.e.*, the lumber in question).

The plaintiff says he was off and on, away from home when the second letter arrived and did not answer those letters or do anything till he came to Owen Sound on 18th December.

The plaintiff's inaction when he might have warned Keenan led, as it has turned out, to the money being paid by the latter in ignorance of the real state of affairs, and has its influence by inducing me to withhold costs from the plaintiff, while I order the defendant to pay to the plaintiff the value of the stuff, in all \$285.

Foster had no title to the lumber and no right to sell it under the statute, and of the two innocent persons injured by him the defendant is the one who must make good the plaintiff's loss, but as I have said, without costs.

G. A. B.

MACDONALD ET AL. V. GRAND TRUNK R. W. CO.

Railway Company—Carriage of Goods—Condition Limiting Liability for Loss—51 Vict. ch. 29 (D.)—Canadian Company—Part of Line in Foreign Country.

The Railway Act of Canada is not applicable to a railway situate in a foreign country, though operated by a company incorporated by or under the authority of the Parliament of Canada.

Therefore, where goods shipped from Scotland to be delivered at Portland, Maine, U. S., to the Grand Trunk Railway Company, and by that company to be forwarded thence to the plaintiffs at Toronto, were destroyed by fire on the line of that company in New Hampshire, U. S., by negligence from which they were protected from liability by the terms of the contract for carriage :—

Held, that the provisions of sec. 246 of 51 Vict. ch. 29 (D.), disabling a railway company from relieving itself from liability for its own negligence or that of its servants, were not applicable to the defendants' contract; and an action to recover damages for the loss of the goods failed.

THIS was an action to recover from the defendants, as *Statement* carriers, the value of certain merchandise of the plaintiffs which was destroyed by fire while being carried by the defendants for hire, through their negligence, as alleged • by the plaintiffs.

The defendants set up the conditions and exceptions of the bill of lading as exempting them from liability for the loss of goods by fire.

It was admitted that the loss by fire occurred in the State of New Hampshire on a line operated by the defendants.

The plaintiffs relied upon sec. 246 (3) of the Railway Act of Canada, 51 Vict. ch. 29 (D.), which is as follows :—

“ Every person aggrieved by any neglect or refusal in the premises, shall have an action therefor against the company,—from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant.”

The action was tried before MEREDITH, C. J., without a jury, at Toronto, on the 10th April, 1900.

Aylesworth, Q. C., and Spencer Love, for the plaintiffs.

Wallace Nesbitt, Q. C., and R. McKay, for the defendants.

Judgment. May 10, 1900. . MEREDITH, C. J. :--

Meredith,
C.J.

It was conceded on the argument that unless the provisions of sec. 246 of the Railway Act (51 Vict. ch. 29 (D.)) are applicable to the defendants' contract for the carriage of the goods in question, the plaintiffs must fail in their action.

The goods were shipped upon the Allàn Line steamship "Sarmatian," at Glasgow, in Scotland, and by the terms of the bill of lading were to be delivered at Portland, Maine, to the Grand Trunk Railway Company, and by that company or its connections to be forwarded thence to the station nearest to Toronto, and there delivered to the plaintiffs.

The goods reached Portland in safety, and were there delivered by the steamship company to the Grand Trunk Railway Company, whose agent gave to the former a receipt for the goods, stating as follows: "to be delivered at the several places to which the said goods were consigned and said goods are received by this company for transportation to their destination upon the same terms and conditions as to responsibility as are contained in the ship's bills of lading granted for said goods respectively at point of shipment."

The goods were destroyed by fire on the line of the Grand Trunk Railway Company in the State of New Hampshire, and, it may be conceded, under circumstances which would render the defendants liable to make good the loss unless they are protected from liability by the terms of the bill of lading and shipping receipt, and it is not open to question that the loss is one for which, according to the terms of these instruments, the defendants are not to be answerable, but it was contended by the plaintiffs' counsel that the loss having happened owing to the negligence of the servants of the Grand Trunk Railway Company the provisions of the bill of lading and shipping receipt which are relied on by the defendants are not binding on the plaintiffs, by reason of the provisions of the Railway Act to which I have referred.

With this contention I am unable to agree.

Judgment.

The Railway Act is, in my opinion, not applicable to a railway situate in a foreign country, though operated by a company incorporated by or under the authority of the Parliament of Canada. Whether the Parliament of Canada has power to bind a company incorporated by it as to the terms upon which it shall carry goods delivered to it, in a foreign country, it is unnecessary to consider, for, conceding that it has that power, it has not, in my opinion, assumed by the Railway Act to exercise it. Looking at the various provisions of that Act, it is manifest that they were intended to apply only to railways over which the Parliament of Canada had jurisdiction, and, *a fortiori*, not to railways situate in a foreign country. This is put beyond all doubt by the provisions of sec. 3, which makes the Act, with certain exceptions not necessary to be referred to, applicable to all persons, companies, and railways within the legislative authority of the Parliament of Canada.

Meredith,
C.J.

Unless possibly in the way already indicated, it is not open to question that the Parliament of Canada had not jurisdiction to legislate as to the working of railways in a foreign country, or to fix upon a carrier operating such a railway any such liability as that imposed by sec. 246.

The plaintiffs' action therefore fails, and must be dismissed with costs.

E. B. B.

PIGOTT ET AL. V. EMPLOYERS' LIABILITY ASSURANCE
CORPORATION.

*Insurance—Employer's Liability Contract—Alteration after Execution—
Foreign Company—Local Agent—Authority—Notice.*

A local agent of an English insurance company, without authority from any one, upon the request of the assured, and after some correspondence with the chief agent for the company in Ontario as to other changes, which had been refused to the knowledge of the assured, altered an employer's liability policy which had been sent to him for delivery to the assured by making it comprehend the workmen at a place other than those named in the policy, and then handed it to the assured, who paid him the premium. He then sent the premium to the chief agent for Ontario, and advised him at the same time of the alteration made. The power to make any change in the policy did not rest in the local agents, nor in the chief agent for Ontario, but only in the manager and attorney for Canada, who was not notified of the alteration :—

Held, that the company could not be held to have authorized the alteration and were not bound by the contract as altered.

Statement. THIS was an action brought by Pigott & Ingles, contractors, to recover part of the premium paid by them to the defendants for an employers' liability policy, which had been cancelled, and also for indemnity under the policy in respect of a workman's claim which arose while it was in force. The facts are stated in the judgment.

The action was tried at Hamilton on the 22nd June, 1899, before ROSE, J., without a jury.

Osler, Q. C., and Bruce, Q. C., for the plaintiffs.

Aylesworth, Q. C., for the defendants.

May 9, 1900. ROSE, J.:—

The defendant company had its head office at London, England; its chief office in Canada at Montreal; its chief agency for Ontario at Toronto; and a local agency at Hamilton.

At the time of the application in question, the manager and attorney for Canada was F. Stancliffe; the chief agent for Ontario, C. W. J. Woodland; the local agents at Hamilton, Routh & Payne.

Judgment.

Rose, J.

The plaintiffs made an application for assurance up to \$30,000. The application was made in May, 1897, and stated that the risk commenced at noon on the 26th day of that month. The places at which the plaintiffs were carrying on work named in the application were "Stonefield, Que., and a few men temporarily loading plant from cars to scow at Ottawa, Ontario."

The application was forwarded from Routh & Payne to Woodland, and by him, as I understand it, sent to the head office.

The application was accepted, and the policy issued pursuant to it, dated the 10th June, 1897, which provided for insurance from the 26th May preceding.

Of the agreements and conditions under which the policy was issued and accepted, No. 10 was as follows :

"The terms and conditions of this policy are not to be changed by agents." This policy was forwarded to Woodland, and by him to Routh & Payne on the 11th June, 1897. It was returned to Woodland by Routh & Payne to have an addition made to the places at which the workmen were employed, the addition being "and Napierville Junction Ry. between St. Valentin and St. Remi, Que."

On the 15th June the manager at Montreal returned the policy to Woodland, stating that the policy was amended as requested, and on the 16th Woodland forwarded the policy so amended to Routh & Payne. The application was also amended by adding the same words.

On the 24th June Routh & Payne returned the policy to Woodland to have an alteration made as to rates, which it is not necessary to more fully specify. This alteration Woodland declined to consent to, and enclosed a letter, dated the 28th June, to be handed to Pigott & Ingles, stating the position taken by him.

Further correspondence took place, and on the 2nd July the policy was returned by Routh & Payne to Woodland, requesting that the indorsement be made in accordance with Pigott & Ingles's desire. On the 3rd July

Judgment.

Rose, J.

Woodland wrote a letter which is material. In it he declines in terms to grant the request. In the letter we find the following sentences: "We will insure Messrs. Pigott & Ingles in the places mentioned on their policy, and in these places only. * * We are on their works at Ottawa, Ont., Stonefield, Que., and the Napierville Junction Ry. between St. Valentin and St. Remi, Que." The letter also said: "If this is not agreeable to Messrs. Pigott & Ingles, the only thing we will have to do is to cancel the policy forthwith."

On the 6th July Routh & Payne again return the policy, renewing the request. Some of the correspondence has been lost, but the next letter in order of date is one of the 9th July, from Stancliffe to Woodland, confirming the position taken by Woodland; and on the 12th July wrote to Routh and Payne a letter, from which I extract as follows: "I am afraid we will have to cancel this policy unless our clients will accept the policy as it now stands. I wrote to the head office in accordance with your instructions, and to-day received a reply in which they state they will not alter the policy in any way. * * I have now for the third time requested my head office to alter this policy, and they have refused. I will not ask them again."

This letter was forwarded by Routh & Payne to the plaintiffs on the 13th July.

On the 21st July Woodland wrote to Routh & Payne: "If these people have accepted our policy as per the conditions of my letter to you of the 12th instant, will you kindly let me have a cheque for the premium at once? If they have not accepted our policy, please return the same so that it can be cancelled."

Further letters were written by Woodland, asking for payment of the premium, when on the 24th August he received a cheque from Routh & Payne. Accompanying the cheque, but, as I understand it, on a postal card or in a separate envelope, but received at the same time, was the following communication: "We have taken the liberty

of adding the following words: 'and near Stonefield on the Ontario side of the Ottawa river.' There appears to be part of Stonefield in Ontario as well as Quebec, hence the necessary change; please acknowledge."

Judgment.
Rose, J.

Woodland acknowledged receipt in these words: "I am in receipt of your favour of the 24th instant enclosing cheque for \$255 in full payment of premium on Pigott & Ingles's policy number 396, for which I thank you."

An accident occurred at the works near Stonefield on the Ontario side of the Ottawa river, by which one James St. Croix was seriously injured, which caused his death. His mother brought an action against the plaintiffs, and recovered judgment for \$600 damages with costs of action.

The plaintiffs claim that the policy covered the accident at such place.

This accident happened on the 31st August. The defendant company, in accordance with powers reserved by the contract, on the 10th September cancelled the policy. The plaintiffs claim a return of the unearned premium, namely, \$286.85, and for indemnification against loss occasioned by reason of the judgment obtained against them.

It is perfectly clear that the power to make any change whatever in the policy did not rest in Woodland, but was, as to Canada, vested in Stancliffe. The power of attorney from the company to him makes that clear, and it also appears from the rate-book and manual for agents, put in at the trial, pp. 4 and 5, paragraphs 3 and 6.

Paragraph 3 provides: "Agents have no authority * * to make any change whatever in any application, policy, renewal, permit, or indorsement * *."

"6. Agents are not permitted under any circumstances to allow any change in a policy after it is written; and they should give no advice to policy holders concerning changes in written contracts."

That the plaintiffs knew this, or must be taken to have known it, should, I think, be inferred from the extract from the agreements and conditions under which the

Judgment.

Rose, J.

policy was issued, No. 10 above set out, by the course pursued in having added to the policy the Napierville Junction Railway, and by the terms of the letter of the 12th July, from Woodland to Routh & Payne, extracts from which are above set out.

The argument on behalf of the plaintiffs amounts to this: that, although the contract was made with the company in accordance with the application, and although the company through its general manager and attorney in Canada had no notice whatever of the addition made by the local agents in Hamilton, and although the local agents had no power to make such alteration, and although Woodland, the chief agent for Ontario, had no power to make such alteration, yet because the chief agent knew that such alteration was made and did not report it to the general manager, the company must be held to have authorized the alteration and is bound by the contract as altered.

I have looked in vain for any authority in the text books or cases cited for the plaintiff for such proposition. The case which was pressed upon me as being in point was *Campbell v. National Life Insurance Company* (1874), 24 C. P. 133. That, however, was entirely different, the foreign insurance company being held bound by the acts of the general agents of the company in Canada.

I was referred to May on Insurance, 3rd ed., sec. 130 A, where it is stated as follows: "When the original policy was rendered void by an act of the agent, who with good intention, but without authority, altered the policy to make it correspond to the agreement, and a loss thereafter occurred, the company were held bound by the first intentions of the parties. An agent who forwards the application to the company and whose power is therefore manifestly limited to the delivery of the policy and receipt of the premium, cannot rightly be supposed to have power to alter the contract by the insertion of a clause agreeing to pay the loss to another than the assured, The agent undertaking to procure a change in a policy

acts for the insured. A clause inserted in a policy without authority may be ratified by the company." And I think that is fairly stating the law.

Judgment.
ROSE, J.

The plaintiffs must, in my opinion, be held to have known that the alteration made was unauthorized, and that they accepted the policy and paid their premium on the terms and conditions contained in the document before such clause was added, and that the rights and liabilities must be determined by the policy before the alteration was made, and that all that the plaintiffs are entitled to is the unearned premium. By the terms of the application and of the policy the risk must, I think, be taken to have attached on the 26th May, and to have continued until the cancellation of the policy on the 10th September.

The company has been willing to pay such amount to the plaintiffs. Therefore the plaintiffs must pay the costs of the action. The defendant may deduct its costs of the defence from such sum, paying the balance, if any, to the plaintiffs, or if the costs exceed such sum, there will be judgment for the defendant for the excess. If there is any balance coming to the plaintiffs, and the defendant does not pay it within thirty days after ascertainment of the amount, the plaintiffs may enter judgment for such balance. Otherwise the action is dismissed.

My attention was directed to sec. 75 of R. S. O. ch. 203*, being the Ontario Insurance Act, as shewing that notice to Woodland was notice to the company. It is manifest that the section does not apply to anything of the nature we are now considering.

As to the authority of agents, Porter's Law of Insurance, 3rd ed., p. 447, may be referred to.

E. B. B.

*75. Subject to statutory condition 23 given in section 168, delivery of any written notice to any insurance corporation for any purpose of this Act, where the mode thereof is not otherwise expressly provided, may be by letter delivered at the chief office of the corporation in Ontario, or by registered post letter addressed to the corporation, its manager, or agent at such chief office, or by such written notice given in any other manner to an authorized agent of the corporation.

JAMES V. THE GRAND TRUNK RAILWAY COMPANY.

Railways—Culvert—Duty to Fence—Negligence.

A natural watercourse, which flowed through a culvert under a railway track, dried up in the summer, and to prevent cattle from passing through it the railway company had placed gates in the culvert, which they neglected to keep up, and by reason of the absence thereof, of which the company was duly notified, the plaintiff's cattle, which were lawfully pasturing in a field on one side of the track, got through the culvert into a field on the other side of the track, and from thence on to the railway track where they were injured :—

Held, that the defendants were bound to keep the watercourse as part of their railway properly fenced, and were liable for the damages sustained by the plaintiff.

Statement.

THIS was an action tried before STREET, J., without a jury, at the Hamilton Spring Assizes, on April 23, 1900.

Teetzel, Q.C., and Thomson, for the plaintiff.

H. S. Osler, for the defendants.

The following statement of facts is taken from the judgment of STREET, J. :—

The plaintiff was the owner of two horses, which had been put out by him to pasture in a field owned by one Burns, under an agreement with the latter. The field in question lay to the south of the defendants' railway, which it adjoined. Burns was the owner of another field on the north side of the railway, the two fields being only separated by the railway. Where the railway passes between these two fields the track is carried upon a high embankment, through which a natural watercourse, dry in the summer but full at other times, passes, by means of a broad and high culvert. Both fields have been at times used as pasture fields, and down to nine years ago the defendants were in the habit of maintaining gates or barriers, to prevent cattle passing through the culvert when the watercourse was dry, but they have not done so since then, and the section foreman having been asked to put up a gate during last summer, refused to do so, insisting that the company were not bound to fence a natural

watercourse. It was known to Burns, but not to the plaintiff, that cattle had, at times when the watercourse was dry and no barrier was up, passed from one field to the other through the culvert. Statement.

In September last the two horses of the plaintiff wandered from the south field, in which they were pasturing, through the culvert into the north field, and thence through a gap in the fence on to the adjoining highway, and thence over a cattle guard upon the defendants' line of railway, where they were killed by a passing train.

It was agreed that their value was \$300; and the present action was brought by the owner of the horses to recover that sum.

April 27th, 1900. STREET, J.:—

The action is founded upon the allegation of the negligence of the defendants in omitting to perform their statutory duty to fence their railway, and that the horses were killed by reason of this negligence.

In my opinion, the defendants were bound to keep the watercourse, which was a part of their railway, properly fenced, and the loss to the plaintiff is the direct, and not the remote, result of their neglect of this duty.

There was no duty resting upon the owner of the north field to fence it at all, for he did not put the horses in that field, but into the south field, and their escape from that field was due to the defendants' omission to fence it.

The defendants cannot set up as a defence that the plaintiff's horses were improperly upon the highway, as in *Nixon v. Grand Trunk R. W. Co.* (1892), 23 O. R. 124, because it was the result of the defendants' negligence that they were there. They cannot be allowed first to permit the plaintiff's horses to get upon the highway, and then to resist the claim for damages by setting up that the horses should not have been there.

The interposition of the north field, and the fact that it was from that field and not from the south field or from

Judgment. the defendants' property, that they got on to the highway, makes no difference, because there was no duty on the part of the owner to the defendants to fence the north field.

Street, J.

There must be judgment for the plaintiff for \$300 and the costs of the action: *Powell v. Salisbury* (1828), 2 Y. & J. 391; *Laurence v. Jenkins* (1873), L. R. 8 Q. B. 274; *Dunsford v. Michigan Central R. W. Co.* (1893), 20 A. R. 577; *Holden v. Rutland and Burlington R. W. Co.* (1858), 30 Vt. 297.

G. F. H.

[DIVISIONAL COURT.]

THOMPSON V. McCRAE.

Division Courts—Trial—Adjournment—New Trial—Motion for—Commencement of Fourteen Days.

Where at the sittings of a Division Court a case is "adjourned for plaintiff on payment of costs within ten days otherwise judgment for the defendant," the two weeks within which a motion can be made for a new trial, the costs not being paid, does not commence to run until the expiration of the ten days, for until then there is no judgment.

Statement. THIS was an appeal from the judgment of the Judge of the Eighth Division Court of the county of Simcoe.

The action was brought to recover \$107 part purchase money of a horse, and interest thereon for fifteen months. The motion by way of appeal was for a new trial, or, in the alternative, for an order for prohibition, on the ground that the Judge had no power to enter judgment for the defendant, but was limited under sec. 120 of the Division Courts Act, R. S. O. (1897) ch. 60, to entering a nonsuit.

The action was to have been tried with a jury. It first came on for trial at the November Court, when it was adjourned to the Court which sat on the 30th January, 1899.

On the 30th January when the case was called, the

defendant was present, but not the plaintiff, he understanding the case would not be proceeded with at that Court. Statement.

The learned Judge made the following order, which was endorsed on the summons: "Adjourned for plaintiff on payment of costs within ten days, otherwise judgment for the defendant."

The costs were not paid.

On the 21st February the plaintiff moved for a new trial, contending that the two weeks in which a motion for a new trial could be made, commenced to run from the expiration of the ten days referred to in the order of the learned Judge.

On the 8th March the learned Judge gave judgment refusing the motion, on the ground that the judgment must be deemed to have been given on the 30th of January, so that the motion should have been made within fourteen days from that date, and therefore he had no jurisdiction to grant the order for a new trial.

May 9th, 1900, before a Divisional Court, composed of FERGUSON, and ROBERTSON, JJ., the appeal was argued.

C. C. Robinson, and *Stonehouse*, for the appellant.

Boys, for the defendant.

May 10th, 1900, the judgment of the Court was delivered by

FERGUSON, J. :—

There was not a trial of the case on the 30th of January. There was then an adjournment of the trial for the period of ten days at least. The case could not have been standing upon an adjournment of the trial and at the same time standing after trial. There was no decision, judgment or conclusion of the trial till the expiration of the ten days' adjournment of the trial. This being the case the motion

Judgment. made against the so called judgment and for a nonsuit
Ferguson, J. instead thereof was within the fourteen days and in good
time. The learned Judge nevertheless declined to entertain the motion, or rather decided it on the sole ground that it was too late, and that in consequence he had no power or jurisdiction.

In this we think the learned Judge was in error. He should have heard and disposed of the motion upon the merits, and had he done so we think it beyond doubt that the nonsuit asked by the plaintiff or a new trial should have been granted. There seems to be power under the statute, section 168, to make the order here for a new trial in the case, and this order is made, and we further order that all costs incurred in the action in the Division Court shall abide the event.

The plaintiff's appeal is therefore allowed and we think with costs, especially inasmuch as the motion for the nonsuit was strenuously opposed by the defendant.

The necessary order to the Court below under section 168 will go.

G. F. H.

[DIVISIONAL COURT.]

RE NILICK V. MARKS.

Division Courts—Judgment Obtained by Fraud—Jurisdiction—Power to Set Aside.

A Judge in an action in the Division Court, apart from the jurisdiction conferred by section 152 of the Division Courts Act to grant a new trial within the fourteen days thereby prescribed, has not any inherent jurisdiction to set aside a judgment by reason of its having been procured by fraud and to order a new trial.

THIS was a motion by the defendant for an order for *Statement.* prohibition to the junior Judge of the district of Algoma.

April 27th, 1900. *A. F. McMichael*, for the plaintiff.
J. Grayson Smith, for the defendant.

The facts are stated in the judgment.

May 10th, 1900. MEREDITH, C. J.:—

Motion by the defendant for an order prohibiting the junior Judge of the district of Algoma from further proceeding with this plaint or action in the Fourth Division Court of that district, upon the ground that the learned Judge had no jurisdiction to set aside the judgment in favour of the defendant which had been directed to be entered, and to order a new trial, inasmuch as no application for a new trial was made within fourteen days after the trial.

The learned Judge, as I understand, made the order complained of, not under section 152 of the Division Courts Acts, R. S. O. (1897), ch. 60, but in virtue of his supposed inherent power to set aside a judgment obtained by fraud—the fraud being, it is said, that the defendant obtained the judgment in his favour by producing as true copies of or extracts from his books which the learned Judge found not to be true copies of or extracts from them but fabricated ones, intended to deceive, and which did deceive.

The Superior Courts have undoubtedly jurisdiction to

Judgment.
Meredith,
C. J.

relieve a party against whom his opponent has by fraud obtained judgment. That relief is obtained, in England, by action to set aside the judgment (*Cole v. Langford*, [1898] 2 Q. B. 36); and in this Province by petition in the action in which the judgment has been recovered (Con. Rule 642), though but for the rule the procedure in this Province would be the same as that which obtains in England.

It is well settled that the Judge has no jurisdiction to grant a new trial under section 152 unless the application for that purpose is made to him within the time prescribed in the section; and it is, I think, equally clear that there is no jurisdiction, in the Judge of a Division Court, apart from the section, to set aside a judgment even though it has been obtained by fraud, where the judgment has been pronounced at the trial.

Nor has the Division Court jurisdiction in an action to set aside a judgment obtained by fraud—that not being one of the cases in which the Division Court is declared to have jurisdiction by section 72.

It is unnecessary to consider where, if at all, the plaintiff may obtain relief; all that I am called upon to say is whether it has been sought in the proper forum, and being of opinion that it has not, the order for prohibition must go, and the respondent must pay the costs of the application.

From this judgment the plaintiff appealed to the Divisional Court.

On June 4th, 1900, the appeal was argued before ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ., when the same counsel appeared.

At the conclusion of the argument the appeal was dismissed with costs, the Court agreeing with the views expressed by MEREDITH, C. J.

G. F. H.

IN RE THE OTTAWA PORCELAIN AND CARBON COMPANY,
LIMITED.

*Company—Liquidation—Taxes and Water Rates—Right to Prove For—
35 Vict. ch. 80, secs. 11, 13 (O.); 42 Vict. ch. 78, sec. 7 (O.).*

The right to prove a claim for taxes against an incorporated company in liquidation depends upon the right to maintain an action therefor, which right of action only exists when the taxes cannot be recovered in any special manner provided for by the Assessment Act, as, for example, by distress, or sale of the land.

Where, therefore, a claim was made for arrears of taxes against a company in liquidation, and it was shewn that before the date of the winding-up order the taxes might have been, but were not, recovered by distress, the claim was disallowed.

A board of water commissioners, by sec. 11 of 35 Vict. ch. 80 (O.), were empowered to fix the water rates payable by the owner or occupant of any house or land which were to be a charge thereon; and by section 13 to make and enforce all necessary by-laws for the collection thereof, and for fixing the time or times and the places for payment, which, on default, was to be enforced by shutting off the water, suit at law, or distress and sale of the occupant's goods. The rights and powers of the water commissioners, including the right to pass the necessary by-laws, were transferred to the municipal corporation of a city by 42 Vict. ch. 78, and by sec. 7, uncollected water rates were made a lien on the premises and collectable by sale thereof. A by-law was duly passed by the corporation fixing the rates to be paid, and the company were from year to year duly assessed therefor:—

Held, reversing the judgment of the local Master, that a corporate liability was imposed on the company to pay such rates and a claim therefor constituted, on which the corporation could prove as ordinary creditors.

THIS was an appeal by the corporation of the city of Statement.
Ottawa, from the report of the local Master at Ottawa, refusing to allow certain claims made by the corporation of the city of Ottawa, to rank upon the estate of the Ottawa Porcelain and Carbon Company, Limited, in the hands of a liquidator under the Dominion Winding-up Act.

The facts of the case were not called in question, and are sufficiently set forth in the written reasons given by the local Master, and in the judgment of STREET, J.

The following is the judgment of the local Master.

February 9th, 1900. W. L. SCOTT, Master:—

The Ottawa Porcelain and Carbon Company, Limited, now in process of liquidation, were the owners of certain

Judgment. real estate in the city of Ottawa on which their factory
The Master and warerooms were situated, subject to a mortgage
at Ottawa. thereon to one J. Roberts Allan. The latter filed his claim
under the mortgage and placed a value on the security
slightly in excess of the amount of the claim, and the
liquidators, with my approval, consented to his retention
of the property at the value placed upon it, as provided by
section 62 of the Winding-up Act.

The liquidators also consented to a judgment for
immediate foreclosure in proceedings begun by the mort-
gagee prior to the date of the winding up order. After
the property had thus passed out of the hands of the
liquidators, the municipality of the city of Ottawa filed
with the liquidators a claim for \$641.91 for municipal
taxes for the years 1895, 1896, 1897, 1898, and 1899;
\$33.92 for snow cleaning rates for the years 1896, 1897,
1898, and 1899, and \$902.42 for water rates for the years
1895, 1896, 1897, 1898, and 1899, or a total of \$1,578.25.

The fact that these taxes were due seems to have been
unknown to or overlooked by both the mortgagee and the
liquidators, and they were not included in the mortgagee's
account filed, nor was any reference made to them when
the land was taken over by him.

The liquidators served on the corporation a notice dis-
puting their right to rank on the estate for the amount of
these taxes, or, in the alternative, their right to be scheduled
for such as privileged creditors. On the return of the
warrant the corporation did not appear, preferring, I pre-
sume, to rely on their remedy against the land, and as the
mortgagee seemed to me to be vitally interested in the
result, I directed him to be served, and he was thereafter
represented before me and opposed the application of the
liquidators to have the city's claim disallowed.

By section 16 of the Winding-up Act, "When the
winding up order is made, no suit, action or other pro-
ceeding shall be proceeded with or commenced against the
company, except with the leave of the Court and subject
to such terms as the Court imposes"; and by section 17,

"Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding up order, shall be void."

Judgment.
The Master
at Ottawa.

I see no reason to limit the plain words of this latter enactment by excepting from them distresses for municipal taxes. The point is not, however, of immediate importance, for although a seizure was threatened in the present case, none was actually attempted to be put in force.

By section 56 of the Act, "When the business of a company is being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company,—a just estimate being made, as far as is possible, of the value of all such debts or claims as are subject to any contingency or sound only in damages, or which, for some other reason, do not bear a certain value."

The evident test here would seem to be :—Is the claim such a one as could under ordinary circumstances be recovered by suit? The Act, for convenience, substitutes a claim in the Master's office for the ordinary remedy by suit; but, apart from permitting future and contingent claims to be proved, it is evidently not intended that the rights of claimants should be in any way enlarged.

Apart from the winding up proceedings, then, could the city recover these taxes from the company by suit? As the water rates stand on a different footing from other taxes it will be more convenient to consider them separately. The rates for snow cleaning are collected as a local improvement, and they are in consequence governed by the sections of the Assessment Act applicable to ordinary taxes.

For the collection of ordinary taxes three remedies are afforded by the Assessment Act, R. S. O. (1897), ch. 224; first, distress, under section 135; second, suit as for a debt,

Judgment. under section 142; and third, sale of the lands, under
The Master section 173.
at Ottawa.

With the municipality's lien on the land, enforceable by sale, we have nothing to do here, the land being no longer held by the liquidators. No distress was ever attempted to be levied, although it was proved that property many times greater in value than the amount of taxes and water rates due was on the property continuously during all of the years in question up to the 5th of May, 1899, the date of the winding up order. There was some evidence, at least, as regards the water rates, that the city authorities refrained from seizing at the request of certain officials of the company; but whatever effect that circumstance might have as regards the company, I do not think the liquidators' position can be affected by it.

Section 142 of the Assessment Act, giving the right of suit—or the relevant portion of it—reads as follows: "If the taxes payable by any person cannot be recovered in any special manner provided by this Act, they may be recovered, with interest and costs, as a debt due to the local municipality."

The effect of the language of this section was considered by Richards, J., afterwards Chief Justice of Canada, as far back as 1855, in the case of *Municipality of Berlin v. Municipality of Grange* (1856), reported in 5 C. P., at p. 211. He says, p. 228: "After going carefully through the statute and considering its scope and tendency, I come to the conclusion that with regard to taxes on lands they cannot be collected by action, until it is ascertained that the amount cannot be recovered by sale of the land, which I conceive to be a *special manner* pointed out by the Act for such recovery." A few lines further on he says that "having failed to recover the tax as to personal property of any person rated on the roll for want of property to distraint, the amount of such tax may be recovered, with interest, as debt due to the municipality." The other members of the Court viewing the case from a somewhat different standpoint, did not find it necessary to pro-

nounce on the point in question. The case was appealed and is reported (1856) 1 E. & A. 279. At p. 286, Chief Justice Sir J. B. Robinson, Bart., says: "I observe that Mr. Justice Richards, in his judgment below, did not take the same view of this point, but he was strongly against the sufficiency of the declaration upon other grounds, in which I am disposed to concur."

Judgment.
The Master
at Ottawa.

The next reported case in which the point is dealt with is *Town of Niagara v. Milloy* (1882), a decision of Senkler, Co. J., of St. Catharines, reported 21 C. L. J. N. S. 394. This was an action to recover the amount of certain taxes. The learned County Judge after quoting the portion of the judgment of Mr. Justice Richards in *Municipality of Berlin v. Grange*, just referred to, adds, at p. 396: "I have found no case in which this view of the law has been dissented from or reversed, and on this ground I am of opinion that the present action cannot be maintained, the plaintiffs not having attempted to collect the taxes by sale of the lands assessed, which is one of the special modes pointed out by the Act for collecting the taxes."

The next case bearing on the question is *Carson v. Veitch* (1885), 9 O. R. 706, in which Rose, J., says (p. 711): "It may be, I am inclined to think it is, the law, that where there is sufficient distress upon the property and the municipality by its own laches puts it out of its power to distrain, then section 100" (now 142) "does not give the right to collect by action. I cannot think that the language there used: 'If the taxes payable by any person cannot be recovered in any special manner provided by this Act,' refers to such a case, but only to a case where there is no distress or sufficient distress, or where, for some other reason not arising from the neglect or default of the municipality, the taxes cannot be collected."

This is only *obiter dicta* as the point was not necessarily involved in the decision of the case, but it is of course entitled to the greatest respect as the opinion of an eminent Judge who still sits on the Bench.

In Harrison's *Municipal Manual*, 5th ed., at p. 812, there
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Judgment. is the following note to the section in question: "The right
The Master to sue for taxes is, apparently, only given when the tax
at Ottawa. 'cannot be recovered in any special manner provided by
this Act,'—such as distress and sale in the case of resident
tax payers, and sale of lands in the case of non-resident
proprietors who have requested their names to be put on
the roll": *Berlin v. Grange*. When there is a sufficient
distress on the property and the municipality by laches
puts it out of its power to distrain, it seems that this sec-
tion would not give a right of action: *Carson v. Veitch*,
9 O. R. 796.

It only remains to mention the case of *Custon v. Corporation of Toronto* (1898), 30 O. R. 16, and (1899) 26 A. R. 459. This was a suit for illegal distress in which it was held that where there is sufficient property available for distress, on land assessed, during all the time in which the collector for the year has the roll, the taxes thereon cannot legally be returned to the treasurer and cannot legally be placed upon the collector's roll for a subsequent year. Although not necessary for the decision of the case, Armour, C. J., who delivered the judgment of the Divisional Court, says at p. 25, after quoting the language of section 131 of the Assessment Act, "yet the present is not a case in which these arrears could not have been recovered in the special manner provided by the Act, for they could have been so recovered had the collector performed his duty," citing *Carson v. Veitch*.

The decision was affirmed on appeal, and Burton, C. J., at p. 460, after pointing out that it is the imperative duty of the collector to seize for unpaid taxes, if there is any sufficient distress on the property, adds, "And I incline also to the view that they" (the arrears of taxes) "cannot be recovered as a debt under section 131 * * until every other remedy has been tried and failed, although that question is not before us, and it will be time enough to consider it when it arises."

Osler, J. A. (p. 462), says: "The effect of the judgment would seem to be (I express no final opinion on the point)

that there are now no further remedies open to the defendants for the recovery of the arrears of taxes," thus evidently concurring (though without expressing a final opinion) with the dicta of Armour, C. J., and Burton, C. J. O., just quoted.

Judgment.

The Master
at Ottawa.

It seems to me, then, that before the city of Ottawa could recover for the taxes now in question, under section 142 of the Assessment Act, the onus would lie on them to shew that they could not recover the amount in any special manner provided by the Act, *i. e.*, either by distress under section 135, or by sale of the land under 142. This onus, as they have not even appeared here, they have not of course attempted to displace, nor has the mortgagee done so.

It has not been attempted to be shewn that the amount could not be made out of the lands. As regards the remedy provided by section 135, while it could not have been exercised since the date of the winding up order, it is not disputed that the amount could have been made in that manner at any time prior to that date. *Caston v. Corporation of Toronto*, decides that where there is sufficient distress upon the property it is the imperative duty of the collector to realize the amount due by seizure. In view of that, and of the dicta I have quoted, I must hold that having had it in their power to realize in that way and having neglected to do so, the city cannot take advantage of the provisions of section 142.

It now remains to consider the position of the water rates, and here again the test will of course be, could the city bring a substantive action for the amount now claimed?

The Ottawa city waterworks were constructed under the authority of 35 Vict. ch. 80 (O.), which placed the construction and operation of the works under the control of a body known as the "Water commissioners for the city of Ottawa."

By section 11 of the Act the commissioners were given power "from time to time to fix the price, rate or

Judgment. rent (such price, rate or rent not being less, after the
The Master completion of the water works, than sufficient to pay the
at Ottawa. interest and sinking fund upon the debentures issued for
the construction of water works and the expenses of
maintaining and working the same), which any owner or
occupant of any house, tenement, lot, or part of a lot, or
both, in, through, or past which the water pipes shall run,
shall pay as water rate or rent, whether such owner or
occupant shall use the water or not, having due regard to
the assessment and to any special benefit and advantage
derived by such owner and occupant, or conferred upon
him or her or their property by the water works, and the
locality in which the same is situated ; and such water rate or
rent, as shall be assessed by such commissioners upon such
owner or occupant, shall be and continue a lien and charge,
unless paid, upon such real estate ; and the water com-
missioners shall also have power and authority, from time
to time to fix the rate or rent to be paid for the use of the
water by hydrants, fire plugs and public buildings."

By section thirteen they were further given power, "from
time to time to make and enforce all necessary by-laws,
rules and regulations for the collection of the said water
rent and water rate, and for fixing the time and times
(which shall be quarterly) when, and the places where, the
same shall be payable ; and the said water rents and
water rates when collected shall be paid over to the
chamberlain of the city of Ottawa, and by him placed to
the credit of the water works account ; for allowing a dis-
count for prepayment ; and in case of default in payment
to enforce payment by shutting off the water, or by suit
at law before any Court of competent jurisdiction, or by
distress and sale of the goods and chattels of such owner
or occupant, or of any goods or chattels in his possession,
wherever the same may be found within the city of
Ottawa or the county of Carleton, or of any goods or
chattels found on the premises, the property of or in the
possession of any other occupant of the premises ; Provided
that such distress and sale shall be conducted in the same

manner as sales are now conducted for arrears of city taxes, and the costs chargeable shall be those payable to bailiffs under the Division Court Act; and provided, further, that the attempt to collect such rates by any process hereinbefore mentioned shall not in any way invalidate the lien upon the said premises."

Judgment.
The Master
at Ottawa.

It will thus be seen that while the commissioners were empowered by this latter section to pass by-laws to enforce payment, in case of default, by suit at law or by distress, they could not exercise those powers unless and until they had passed such a by-law.

By 42 Vict. ch. 78 (O.) the powers of the water commissioners were transferred to the corporation. Section 1 of this Act enacts that the corporation "through its council, shall in all respects and in every particular occupy the place and position of the said water commissioners for the city of Ottawa * * and * * the powers to pass all necessary by-laws, rules and regulations, and to enforce the same, are hereby re-enacted as fully as if the same had been repeated herein, save only as they are modified or altered by this Act."

Section 7 reads as follows: "In the event of any water rates or rents in respect of the taking or using of the water supplied by said water works being heretofore, now, or hereafter uncollected and unpaid, the same shall be a lien upon the premises in respect of which the said water has been and is supplied, and the amount of such rates or rents in arrear shall be returned by the chairman of the said committee to the treasurer of the said city annually, on or before the first day of December in each and every year, and the same together with interest thereon at the rate of ten per centum per annum shall thereupon be collected by such treasurer by the sale of the lands and premises, in the same manner and subject to the same provisions, as in the case of the sale of non-resident lands for arrears of municipal taxes."

There is no direct reference in the Act to the collection of overdue water rates by suit further than the words of section 1 already quoted, which re-enact, for the benefit

Judgment. of the corporation, the portions of the earlier Acts giving
The Master power to pass "all necessary by-laws."
at Ottawa.

It will thus be seen that, while unpaid water rates are by both Acts made a lien on the lands, the corporation, like the commissioners to whose powers they succeeded, cannot proceed to collect them by either distress or suit unless and until they have passed a by-law empowering themselves to do so. With the question of distress we are not at present concerned. Suffice it to say, then, that while all the by-laws both of the water commissioners and of the corporation, their successors, bearing on the subject, have been put in, the right to bring an action at law for the collection of water rates is nowhere conferred either on the commissioners or on the corporation.

It therefore follows that the corporation has no such right, and, as I have already pointed out that this right to bring a substantive action must be the test of a claimant's right to rank on the estate in these proceedings, this branch of the corporation's claim must also be disallowed.

In view of the conclusion I have come to, it is of course unnecessary that I should consider the question of whether or not the corporation's claim, if valid, would be a privileged one. In case, however, the Court on appeal should take a different view of the matter, it may be perhaps as well for me to state that in my opinion the claim, even were it allowed, would not be entitled to any priority over the claims of other creditors. The question of what claims are privileged must be decided by the Winding-up Act, and neither in section 56 nor elsewhere in the Act, is any priority given to municipal taxes. Where the land remains the property of the company, however, the point can hardly arise, as the corporation would, presumably, claim a lien on the land, and thus secure a practical priority.

As I pointed out in the course of the argument, this proceeding, despite the presence of the mortgagee, is merely an adjudication on the claim of the city filed herein, and will not affect the relations of the liquidators and the mortgagee to each other.

The appeal from this decision was argued before **Argument.**
STREET, J., on the 28th day of February, A.D., 1900.

Shepley, Q.C., for the appellants.

C. J. R. Bethune for the liquidators.

The arguments and cases cited sufficiently appear from the judgment.

March 16th, 1900. STREET, J.:—

The first question raised upon the appeal is whether the corporation of the city of Ottawa are entitled to rank upon the estate in the hands of the liquidator for the municipal taxes in question at all; and, if so, whether they are entitled to rank for these taxes as privileged or as ordinary creditors.

It was conceded by Mr. Shepley, during Mr. Bethune's argument, that in the present state of the authorities the corporation of Ottawa could not have maintained an action against the Ottawa Porcelain and Carbon Company, for the recovery of the taxes in question under the 142nd section of the Assessment Act, R. S. O. ch. 224, because a special remedy, viz., a right of distress, was afforded by the 135th section. It was upon the position given him by this right of distress that he relied, as affording to the corporation of Ottawa the rights they claimed against the estate. In my opinion the only remedy of the corporation of Ottawa was to have applied to the Court under the 16th section of the Winding-up Act, R. S. C. ch. 129, for leave to distrain. Upon such an application the Court would have determined whether the circumstances were such as to induce them to grant such leave: *Re Exhall Coal Mining Co., Limited* (1864), 4 D. J. & S. 377; *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322, 329; *Re Lundy Granite Co.* (1871), L. R. 6 Ch. 462; *Re Regent United Service Stores* (1878), 8 Ch. D. 616; Buckley's Joint Stock Company Act, 7th ed., pp. 265 *et seq.*

Judgment.

Street, J.

If the distress for taxes had been made before the beginning of the winding up, as appears to have been the case in the unreported decision of the Chancellor to which I was referred, *Re The Army and Navy Co.*, 11th January, 1898, then the Court would, as the Chancellor in that case did, there being no right of proof for the taxes, have preserved the rights of the distraining claimants.

The principle is that where there is no right of action, and therefore no privity between the person entitled to distrain and the company in liquidation, the person entitled to distrain may pursue his only remedy, viz., that of distress, and reap the fruits of it as if there had been no liquidation. But where there is a right of action, even though there be also a right of distress, then the creditor is within the Winding-up Act, and must prove as an ordinary creditor.

It was argued for the corporation of Ottawa that the provision contained in the final clause of the first sub-sec. of sec. 135 of the Assessment Act, R. S. O. (1887), ch. 224, p. 2762, with regard to goods in the hands of a liquidator under a winding up order, gave to these claimants other and greater rights than those to which they are confined by the Dominion Winding-up Act. If, however, the language of that provision if applied to goods in the hands of a liquidator under a winding up order, bears out that contention, then it must be confined to winding up orders under the Ontario Winding-up Act.

I think, therefore, that, so far as the claim for taxes is concerned, the corporation of the city of Ottawa must fail upon this appeal.

The second question is as to the right of the city to prove either as preferred creditors or otherwise for the water rates.

Section 13 of 35 Vict. ch. 80 (O.), is set out at full length in the judgment of the local Master, and contains the powers to which the corporation of the city of Ottawa has succeeded by virtue of the Act 42 Vict. ch. 78 (O.).

I cannot bring myself to concur in the interpretation

which has been placed upon section 13 by my brother Meredith in his considered judgment in the unreported case of *Clemow v. Corporation of Ottawa*,* a copy of which has been put in, and which has been followed by the Master in the present case. But for that judgment I should have held that a by-law was required by the section in question only for fixing the time and place for payment of the rates and the rate of discount to be allowed for payment in advance, but that a power was conferred by the terms of the section itself not only to pass by-laws for those purposes, but also to proceed without any authority beyond that of the section itself to collect the rates in case of default, by action or distress.

Judgment.
Street, J.

If it were necessary for the decision of the present case I should of course hold myself bound by the decision of my brother Meredith it being exactly in point; but it appears to me that the question at present before me is not concluded by it for the following reasons.

By section 11 of the same Act power is given to the commissioners to fix the rates which any owner of a lot through or past which the water pipes shall run, shall pay as water rates, and it is enacted that the water rates, which shall be so assessed, shall be and continue a lien and charge unless paid upon such real estate. Had it not been for section 13, it might have been contended with a good deal of force that under this section, notwithstanding the language implying a personal liability upon the land owner for payment of the rates, the concluding portion of it shewed an intention that the rates should be a charge only on the lot assessed. It must, however, be assumed to have been the intention of the Legislature either that there should or should not be a personal liability upon an owner for payment of the water

* It was held by the learned Judge who heard the action, among other matters not necessary to be noticed, that section 13 of the Act required the passing of a by-law, rule or regulation to enforce payment of water rates by distress. An appeal against his decision was launched, but the case was settled before the appeal was heard.

Judgment.

Street, J.

rates assessed against him, and section 13 shews that the intention was that there should be a personal liability enforceable "by suit at law before any Court of competent jurisdiction" if the commissioners desire to pursue that remedy.

The corporation of the city by their by-law No. 1080, passed in the year 1890, fixed the rates to be paid by property owners, and the insolvent company here were assessed from year to year by name as owners of certain property.

No question has been raised before me as to the validity or correctness of the assessment, and a corporate liability was thereby imposed upon them to pay these rates. This liability is a sufficient foundation for a valid claim on the part of the city corporation to rank upon the estate in the hands of the liquidator. In making their proof they are not bound to prove as secured creditors, notwithstanding their lien upon the property arising under section 11 of the Act, because the lien is upon property in which the insolvent estate, having already surrendered it under the Act to a prior mortgagee, is not interested, and which the liquidator could therefore not give up to the claimant as required by section 62 of the Dominion Winding-up Act: *Ex p. West Riding Union Banking Co.* (1881), 19 Ch. D. 105, 112.

For these reasons I think the appeal of the city corporation upon this ground must be allowed, and they must be admitted to prove as ordinary creditors for the amount of the water rates.

There should be no costs of the appeal as each party has succeeded upon one of the branches of it.

G. F. H.

FARR V. HOWELL.

Railway—Mortgage—Conveyance of Equity by Mortgagor—Expropriation Proceedings—Right of Mortgagor to Notice of.

A mortgagor who has conveyed his equity of redemption subject to the payment of the mortgage is not entitled to notice of expropriation proceedings taken by a railway company with regard to the mortgaged lands; and the absence of such notice does not constitute any defence to an action brought against him by the mortgagee on a covenant to pay the mortgage money.

THIS was an action tried before STREET, J., without a Statement. jury, at Hamilton, on the 24th April, 1900

D'Arcy Tate, for the plaintiff.

P. D. Crerar, for the defendant.

The facts appear in the judgment.

April 28th, 1900. STREET, J. :—

This was an action by a mortgagee against a mortgagor upon a covenant contained in a mortgage to pay the mortgage money.

The mortgagor had conveyed his equity of redemption to one Burke, subject to the payment of the mortgage money.

The Toronto, Hamilton and Buffalo Railway Company then expropriated a part of the mortgaged premises, serving the mortgagee and Burke with notice. Burke refused to accept the sum offered, and an arbitration took place under the provisions of the Railway Act, R. S. C. ch. 109. Counsel for the mortgagee appeared before the arbitrator and offered to accept on behalf of the mortgagee the amount tendered by the railway company. Counsel for Burke, however, refused to accept the amount, and the arbitration proceeded, with the result that a sum less than the amount tendered by the company was fixed as the compensation, and the company was allowed its costs out of the sum awarded.

Judgment.
Street, J.

The mortgagor was not notified of the proceedings until after the making of the award; but he procured Burke, the owner of the equity of redemption, to execute a conveyance to the company after the award had been made.

Upon the present action being brought against him for the balance of the mortgage money, he set up as a defence to the action that he had not been notified of the proceedings under which a part of the mortgaged premises had been alienated, and that the mortgagee being unable to reconvey the premises mortgaged, on being paid the mortgage money was not entitled to enforce payment of it.

In my opinion these facts constitute no defence to the action. The tribunal under the Railway Act was properly constituted, and the price to be paid for the land compulsorily taken was fixed in the manner provided by law. I do not think that either the mortgagee or the railway were bound to give any further notice than that required by law. The mortgagor by conveying his equity of redemption placed his grantee in his own place as the person to whom notice of expropriation proceedings should be given. No collusion or bad faith is suggested; and the question is simply the broad one whether the fact that a mortgagee served with notice of expropriation proceedings is bound to give notice of them to the original mortgagor, upon pain of losing his personal remedy if he fail to do so.

I think this question must be answered in the negative, and that the plaintiff is entitled to recover upon his covenant the balance unpaid upon the mortgage, with costs to the trial inclusive.

The mortgagee has deducted \$300 for his costs of the expropriation proceedings from the amount paid to him out of Court. These costs he offers to submit for taxation.

Unless the parties can agree upon the amount due the plaintiff there must be a reference, the costs of which will be reserved.

G. F. H.

[DIVISIONAL COURT.]

RE BOTHWELL V. BURNSIDE.

Sessions — Costs — Taxation of — Jurisdiction — Formal Order — Criminal Code—55-56 Vict. ch. 29, secs. 380, 384 (D.).

Where the chairman of the General Sessions of the Peace made a minute of dismissal of an appeal from the conviction of a police magistrate, with costs to be taxed by the clerk of the peace, but no formal order was drawn up in pursuance of such minute :—

Held, that a certificate of the clerk as to the amount of such costs and a subsequent order of the Court of General Sessions directing a distress warrant to issue in respect of the same were irregular and must be quashed.

If such formal order had issued the certificate might have been upheld, although the appellant was bound by recognizance conditioned to pay them.

Freeman v. Read (1860), 9 C. B. N. S. 301, specially referred to.

Held, also, that in view of sec. 380 (e) (f) of the Criminal Code, 55-56 Vict. ch. 29 (D.), the formal order might have been drawn up at any future sittings of the Court of General Sessions and the costs included therein *nunc pro tunc* if necessary, the power to determine the amount of such costs not being, as it is in England, confined to the justices at the same General Sessions at which the appeal is heard.

Where proceedings are taken by the chief of police of a town and in his name for an offence against a by-law of the town, his name and not that of the town should appear throughout the proceedings as the informant.

THE following statement of facts is taken from the **Statement.**
judgment of ARMOUR, C.J. :—

Thomas Burnside was convicted before the police magistrate of the town of Bothwell, on the 12th day of May, 1899, for an offence against a by-law of the town on the information of John Colthurst, the chief of police, and from this conviction he appealed to the Court of General Sessions of the Peace for the county of Kent, held on the 13th day of June, 1899, on which day the appeal was entered and came on for trial at an adjourned sitting of the Court on June 29th, 1899, before the chairman alone, no associate being present, when judgment was reserved until July 4th, 1899, the sittings of the Court having been adjourned until July 10th, 1899, when that sittings ended.

On July 4th, 1899, the learned chairman gave judgment and signed the following minute thereof: "Appeal in this case dismissed with costs to be taxed by the clerk of the peace within five days."

Judgment.**Street, J.**

The mortgagor was not notified of the proceedings until after the making of the award ; but he procured Burke, the owner of the equity of redemption, to execute a conveyance to the company after the award had been made.

Upon the present action being brought against him for the balance of the mortgage money, he set up as a defence to the action that he had not been notified of the proceedings under which a part of the mortgaged premises had been alienated, and that the mortgagee being unable to reconvey the premises mortgaged, on being paid the mortgage money was not entitled to enforce payment of it.

In my opinion these facts constitute no defence to the action. The tribunal under the Railway Act was properly constituted, and the price to be paid for the land compulsorily taken was fixed in the manner provided by law. I do not think that either the mortgagee or the railway were bound to give any further notice than that required by law. The mortgagor by conveying his equity of redemption placed his grantee in his own place as the person to whom notice of expropriation proceedings should be given. No collusion or bad faith is suggested ; and the question is simply the broad one whether the fact that a mortgagee served with notice of expropriation proceedings is bound to give notice of them to the original mortgagor, upon pain of losing his personal remedy if he fail to do so.

I think this question must be answered in the negative, and that the plaintiff is entitled to recover upon his covenant the balance unpaid upon the mortgage, with costs to the trial inclusive.

The mortgagee has deducted \$300 for his costs of the expropriation proceedings from the amount paid to him out of Court. These costs he offers to submit for taxation.

Unless the parties can agree upon the amount due the plaintiff there must be a reference, the costs of which will be reserved.

G. F. H.

[DIVISIONAL COURT.]

RE BOTHWELL V. BURNSIDE.

Sessions — Costs — Taxation of — Jurisdiction — Formal Order — Criminal Code—55-56 Vict. ch. 29, secs. 880, 884 (D.).

Where the chairman of the General Sessions of the Peace made a minute of dismissal of an appeal from the conviction of a police magistrate, with costs to be taxed by the clerk of the peace, but no formal order was drawn up in pursuance of such minute :—

Held, that a certificate of the clerk as to the amount of such costs and a subsequent order of the Court of General Sessions directing a distress warrant to issue in respect of the same were irregular and must be quashed.

If such formal order had issued the certificate might have been upheld, although the appellant was bound by recognizance conditioned to pay them.

Freeman v. Read (1860), 9 C. B. N. S. 301, specially referred to.

Held, also, that in view of sec. 880 (e) (f) of the Criminal Code, 55-56 Vict. ch. 29 (D.), the formal order might have been drawn up at any future sittings of the Court of General Sessions and the costs included therein *nunc pro tunc* if necessary, the power to determine the amount of such costs not being, as it is in England, confined to the justices at the same General Sessions at which the appeal is heard.

Where proceedings are taken by the chief of police of a town and in his name for an offence against a by-law of the town, his name and not that of the town should appear throughout the proceedings as the informant.

THE following statement of facts is taken from the Statement.
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On July 4th, 1899, the learned chairman gave judgment and signed the following minute thereof: "Appeal in this case dismissed with costs to be taxed by the clerk of the peace within five days."

Statement. Taxation of these costs was commenced on July 8th, 1899, and was not completed by the clerk of the peace till July 13th, 1899, the appellants' counsel objecting that the Court and not the clerk of the peace should tax the costs. The appellants' counsel, also objected that the taxation could not be proceeded with as the sittings were over.

On July 15th, 1899, the following certificate was issued by the clerk of the peace :

Certificate of the clerk of the peace that the costs of an appeal are not yet paid.

Office of the Clerk of the Peace,
County of Kent.

In the matter of appeal between
Thomas Burnside,

Appellant,

v.

The Town of Bothwell,

Respondent.

I hereby certify that at a Court of General Sessions of the Peace holden at Chatham, in and for the said county on June 13th, 1899, last past, an appeal by Thomas Burnside against a conviction of George Taylor, Esquire, one of Her Majesty's Justices of the Peace in and for the said county came on to be tried and was then heard and determined, and the said Court of General Sessions thereupon ordered that the said conviction should be sustained and that the said appeal be dismissed and that the appellant should pay to the said respondent the sum of sixty-four dollars, and thirty-five cents for his costs incurred by him in the said appeal including the fees to the clerk of the peace for his costs on said appeal, and which sums were thereby ordered to be paid to the said clerk of the peace of the said county forthwith to be by him paid over to the respective parties entitled thereto. And I further certify that the said sums for costs have not nor has any part thereof been paid in obedience to said order.

Dated the 15th day of July, 1899.

Wm. Douglas,

Clerk of the Peace. [L.S.]

At the next sittings of the said Court of General Sessions of the Peace holden on the 12th day of December, 1899, the following order was made:—

In the Court of General Sessions of the Peace in and for the County of Kent.

His Honour Judge Bell	}	Wednesday, the 13th day of
In Court.		December, A. D. 1899.

In the matter of an appeal between

The Town of Bothwell,

Respondent,

v.

Thomas Burnside,

Appellant.

Upon the application of the respondents by their solicitor, upon, reading the notice of motion and an affidavit of service of the said notice of motion on Messrs. Wilson, Kerr & Pike, solicitors for the appellant, and the certificate of the clerk of the peace:—

It is ordered that a warrant of distress be issued, directed to all or any of the constables and other peace officers of the county of Kent to distrain the goods and chattels of the above named appellant, Thomas Burnside, and to realize from the sale of the said goods and chattels the amount of the costs of the respondents herein, as shewn by the certificate of the clerk of the peace in and for the county of Kent, unless such costs are sooner paid.

By order of the Court.

Wm. Douglas, C. P. C. K.

The above recited certificate and order having been certified to this Court:

Mr. DuVernet, on February 21st, 1900, obtained an order *nisi* calling upon His Honour Judge Bell, chairman of the General Sessions of the Peace for the county of Kent, William Douglas, clerk of the peace for the county, the Town of Bothwell, above named, and John Colthurst, the informant, to shew cause why any and every order issued and direction made by the learned chairman of the General Sessions of the Peace in connection with the

Statement. appeal taken by Thomas Burnside to quash the conviction made against him, upon the information and complaint of John Colthurst should not be quashed, with costs, upon the following, amongst other grounds :—

1. The learned chairman of the General Sessions of the Peace was at the December sittings so far as regards this matter *functus officio*.

2. There having been a recognizance duly entered into by the appellant conditioned to abide by such judgment of the Court as should be pronounced upon the appeal, no certificate by the clerk of the peace that the costs awarded against the appellant had not been paid could be rightfully claimed, nor could any distress warrant legally issue for the collection of the costs.

3. The learned chairman in any case had no power to personally direct the issue of a distress warrant.

4. The enforcing of the costs under the circumstances could only have been by process of the Court.

5. The order for costs on the appeal was invalid for not appointing any person to whom or time when they should be paid.

6. The taxation founded upon such order for costs was unwarranted and illegal in that it was neither conducted during the sittings of the Court nor adopted by it.

7. Such taxation should have been conducted in the Court itself while sitting, and not in the private office of the clerk of the peace.

8. The said certificate that costs had not been paid was insufficient for not reciting the time at which they were to be paid and the fact of its expiration without payment.

9. The respondent having procured the issue of the magistrate's distress warrant after the June sittings was precluded from subsequently invoking the jurisdiction of the learned chairman of the Sessions for a like purpose.

10. The conviction against which the appeal was taken was bad on its face, and could afford no warrant for any order, providing either for the collection of the original fine and costs or the costs of the appeal.

11. The town of Bothwell not having been the informant before the magistrate, could not claim or be granted costs. Statement.

The matter was argued on March 6th, 1900, before ARMOUR, C. J., and STREET, J.

Du Vernet, for the defendant, contended that costs must be taxed at the same session at which a case is disposed of; that the Judge himself should have taxed the costs and included them in the order during that session: *In re Rush and Corporation of Bobcaygeon* (1879), 44 U. C. R. 191; *Queen v. Murray* (1867), 27 U. C. R. 134; *In re McCumber and Doyle* (1867), 26 U. C. R. 516; *Queen v. Justices of Staffordshire* (1857), 26 L. J. N. S. (Mag.) 179; *Queen v. George Long* (1841), 1 Q. B. 740; *Queen v. Justices of the West Riding* (1865), 34 L. J. N. S. (Mag.) 142; *King v. Justices of Leicestershire* (1813), 1 M. & S. 442; *Regina v. McIntosh* (1897), 28 O. R. 603; *Suffolk County Lunatic Asylum v. Guardians of the Stow Union* (1897), 76 L. T. 494; and that in any case the town of Bothwell had no right to an order for these costs: *Haacke v. Adamson* (1864), 10 U. C. L. J. O. S. 270.

J. H. Moss, for the prosecutor, contended that the taxation of the costs was a purely ministerial act; that the English cases did not apply to Courts of Session in this Province; and that if there had been error in naming the town of Bothwell as respondent it was only error in procedure: *Queen v. Binney* (1853), 1 E. & B. 810.

The judgment of the Court was delivered on April 10th, 1900, by

ARMOUR, C.J.:—[after stating the facts as above].

The Criminal Code (55-56 Vict. ch. 29 (D.)) provides, section 880b, that the appellant shall give to the respondent or to the justice who tried the case for him a notice

Judgment. in writing in the form NNN. in schedule one to this Act, Armour, C.J. of such appeal within ten days after such conviction or order.

Colthurst was the informant and Taylor was the justice who tried the case for him and to whom the notice of appeal was given. Burnside was therefore the appellant and Colthurst was the respondent: *The King v. Justices of Hants* (1830), 1 B. & Ad. 654; *The Queen v. Smith* (1860), 29 L. J. M. C. 216; *The Queen v. Purdey* (1864), 34 L. J. M. C. 4. And by section 899 of the Criminal Code an appellant may abandon his appeal by giving to the opposite party notice in writing, etc., "the opposite party" being clearly in this case the informant Colthurst, and therefore the respondent, and if the conviction had been quashed with costs the Court must have ordered Colthurst to pay them and could not have ordered the town of Bothwell to pay them.

The proceedings, therefore, subsequent to the dismissal of the appeal were in my opinion improperly entitled.

All that appears to have been done upon the learned chairman giving judgment dismissing the appeal was the signing by him of the following minute: "Appeal in this case dismissed with costs to be taxed by the clerk of the peace within five days," and no formal order of the Court of General Sessions of the Peace was ever drawn up and made in pursuance of such minute as should have been done in compliance with the Criminal Code, section 880e, and section 897, and which should have contained the amount of the costs awarded.

There was, therefore, no warrant or authority for the certificate of the clerk of the peace, or for the order of the Court of General Sessions of the Peace brought before us and they must be quashed.

Section 880e and section 898, seem somewhat in conflict, as did sec. 27 of the Imperial Act, 11 & 12 Vict. ch. 43, and sec. 5 of the Imperial Act, 12 & 13 Vict. ch. 45; but in *Freeman v. Read* (1860), 9 C. B. N. S. 301, the Court held that the clerk of the peace might grant his

certificate that the costs had not been paid whether the person ordered to pay the same had been bound by any recognizance conditioned to pay such costs or not, so that had there been a formal order of the Court of General Sessions of the Peace for the payment of the costs in this case to support it the certificate might have been upheld, although the appellant was bound by recognizance conditioned to pay them. Judgment.
Armour, C. J.

Appeals from summary convictions, and the costs payable in respect thereof are founded upon the statute law, and the provisions of the law regarding them in England and in this country are essentially different.

In *The Queen v. The Justices of Staffordshire* (1857), 7 El. & Bl., at p. 939, Coleridge, J., said: "The first Act giving power to the Sessions to grant costs (on appeals) was, I think, statute 8 & 9 Wm. III. ch. 30, sec. 3; and it carefully confines the power to grant costs to the justices at the same sessions; and many subsequent Acts giving costs refer back to this, so as to tie up the power in the same way. The Act giving power to award costs in the present case is statute 12 & 13 Vict. ch. 45, sec. 5: this enacts that upon every appeal to the Sessions 'the Court before whom the same shall be brought may, if it thinks fit, order and direct' the unsuccessful party to pay costs. The words of the Act restrict the power to that Court."

And Lord Halsbury in *Midland R. W. Co. v. Guardians of Edmonton Union*, [1895] 1 Q. B. 357, points out (at p. 362) the reason of this: "The Legislature knew very well that whatever may be the identity of the Court as an abstraction, it occasionally consists of different persons, and they have accordingly provided that the power to order costs shall be exercised by the Court before which the appeal is tried."

By statute 8 & 9 of Wm. III., ch. 30, sec. 3, the justices in their General or Quarter Sessions of the Peace were authorized to award such costs and charges in the law as by the said justices should be thought "most reasonable and just."

Judgment. And by 12 & 13 Vict. ch. 45, sec. 5, the Court of Armour, C.J. General or Quarter Sessions of the Peace were empowered upon any appeal to award such costs and charges as might appear to such Court "just and reasonable."

It is obvious, therefore, that the duty of determining what costs were "just and reasonable" was a judicial duty which they could not delegate.

But it soon became the practice for the clerk of the peace to tax the costs and for the Court to adopt the amount taxed by him and to insert it in their order, but this had to be done during the same sessions.

In *Ex parte Holloway* (1831), 1 Dowl. P. C., at p. 27, Parke, J., said: "It is every day's practice for the clerk of the peace to ascertain the amount of costs to be allowed. How could the justices do it themselves?" *Sellwood v. Mount* (1841), 1 Q. B. 726.

It then became the practice for the parties to consent to the taxation of the costs by the clerk of the peace out of sessions and by their so doing this implication arose, that the justices dismiss the appeal with costs and say to the parties "the clerk of the peace will settle the amount and it will be inserted in the order afterwards, are you content?" and they make no objection: *The Queen v. Mortlock* (1845), 7 Q. B. 459, at p. 471.

And where there was such consent, express or implied, the Courts would not permit the fact that the costs were taxed by the clerk of the peace out of sessions to be taken advantage of: *Regina v. Shrewsbury & Hereford R. W. Co.* (1855), 25 L. T. 65; *Freeman v. Read*, 9 C. B. N. S. 301; *Southampton Gaslight & Coke Co. v. Southampton Guardians* (1877), 2 Q. B. D. 371. Consent was implied from silence by the Divisional Court in *Midland R. W. Co. v. Edmonton Union* (1893), 70 L. T. N. S. 355.

But in *Midland R. W. Co. v. Guardians of Edmonton Union*, [1895] 1 Q. B. 357, Lord Halsbury repudiated this doctrine and held that express consent was necessary.

In the same case, however, in the House of Lords,

[1895] A. C. 485, Lord Herschell said at p. 488: "In con- Judgment.
sequence of some observations made in the Court of Armour, C.J.
Appeal, I think it right to say that the practice to tax out
of sessions has become, I believe, so common that the
slightest evidence of consent would induce me to hold
that consent had been given."

In this country appeals from summary convictions, with
the costs of such appeals, are provided for by the Criminal
Code in sections 879 to 900 inclusive, and in these sections
a distinction is drawn between the Court and the sittings
of the Court.

By section 880a: "If the conviction or order is made
more than fourteen days before the sittings of the Court
to which the appeal is given, such appeal shall be made to
the then next sittings of such Court; but if the conviction
or order is made within fourteen days of the sittings of
such Court, then to the second sittings next after such
conviction or order."

By section 884: "The Court to which an appeal is
made upon proof of notice of the appeal to such Court
having been given to the person entitled to receive the
same though such appeal was not afterwards prosecuted or
entered may, if such appeal has not been abandoned
according to law, at the same sittings for which such
notice was given, order to the party or parties receiving
the same such costs and charges as are thought reasonable
and just by the Court to be paid by the party or parties
giving such notice.

Under this section the costs would have to be taxed and
included in the order of the Court during the sittings of
the Court, unless taxed out of sessions by consent, and
the amount afterwards filled in the order.

But in section 880 (e) and (f), there is no such restriction
of the power of the Court to the same sittings of the Court
for which notice of appeal has been given.

(e) "The Court to which such appeal is made," that is,
the Court named in section 879, in this case, the Court of
General Sessions of the Peace, "shall thereupon hear and

Judgment. determine the matter of appeal and make such order therein, with or without costs, to either party, including costs of the Court below, as seems meet to the Court, and in case of the dismissal of an appeal by the defendant and the affirmance of the condition or order shall order and adjudge the appellant to be punished according to the conviction, or to pay the amount adjudged by the said order, and to pay such costs as are awarded, and shall, if necessary, issue process for enforcing the judgment of the Court; and whenever after any such deposit has been made as aforesaid, the conviction or order is affirmed, the Court may order the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, to be paid out of the money deposited, and the residue, if any, to be repaid to the appellant; and whenever after any such deposit the conviction or order is quashed the Court shall order the money to be repaid to the appellant."

(f) "The said Court shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another or others of the said Court."

There being no such restriction and the Court of General Sessions of the Peace being a continuing Court as determined by *Keen v. The Queen* (1847), 10 Q. B. 928; *Campbell v. The Queen* (1846), 11 Q. B. 799; *The King v. Justices of Wilts* (1811), 13 East. 352; *The King v. The Inhabitants of Kimbolton* (1837), 6 A. & E. 603; *The Queen v. The Justices of Westmoreland* (1868), L. R. 3 Q. B. 457, and *Midland Railway Co. v. Edmonton Union* (1893), 70 L. T. N. S. 355, I see no good reason why at the next sittings of the Court of General Sessions of the Peace for the county of Kent the formal order should not be drawn up and made in pursuance of the said minute, and the costs included therein *nunc pro tunc* if necessary.

Besides being a continuing Court, the Court of General Sessions of the Peace is always presided over by the Judge of the County Court, or in case of his death or absence by

the junior or acting Judge or deputy Judge, who when Judgment.
sitting in Court is in truth the Court of General Sessions Armour, C.J.
of the Peace as it is not requisite that an associate or
other justice of the peace should be present and therefore
the same reason does not exist for the restriction referred
to as indicated by Lord Halsbury.

And in this case the learned Judge of the County Court
sat alone in disposing of the appeal.

There will be no costs.

A. H. F. L.

END OF VOLUME XXXI.



A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN THE

HIGH COURT OF JUSTICE FOR ONTARIO

ACCIDENT.

See MASTER AND SERVANT, 1.

ACCOUNTS.

See PATENT FOR INVENTION, 1.

ACTION.

Reference of all Matters in Question—Division of Question of Law and Fact—Waiver of.—See CONTRACT, 3.

Negligence — Parent Suing for Death of Child—Damages.—See MUNICIPAL CORPORATIONS, 4.

Right to Maintain—Breach of Fire Limits By-law—Penalty.—See MUNICIPAL CORPORATIONS, 3.

ALIMONY.

Desertion—Offer to Receive Wife Back—Bona Fides.—In an action for alimony, on the ground of desertion, in order to give effect to the husband's

offer and willingness to receive back his wife, the Court must be satisfied that it is made *bona fide*, and not merely set up to prevent the pronouncement of judgment against him.¹¹ *Crothers v. Crothers* (1868), 1 P. & D. 568, specially referred to. *Rae v. Rae*, 321.

See FOREIGN JUDGMENT, 1.

APPEAL.

Executors and Trustees — Fixing Compensation—Appeal from Surrogate Court Judge—R.S.O. ch. 59, s. 36—R.S.O. ch. 129, s. 43.—By virtue of R.S.O. ch. 59, s. 36, an appeal lies to a Divisional Court from an order of a Surrogate Court Judge allowing compensation to an executor under the Trustee Act, R.S.O. ch. 129, s. 43. *In re Alexander*, 167.

From Award of Municipal Engineer—Point first raised on—Jurisdiction.—See DITCHES AND WATERCOURSES' Act.

County Court Judge—Discharging Order—Ca. Sa.]—See COUNTY COURT APPEAL, 1.

Time for — Computation.]—See COUNTY COURT APPEAL, 2.

ARBITRATION AND AWARD.

1. *Motion to Set Aside Award—Time—Publication—R.S.O. ch. 223, s. 465—Arbitrator—Omission to Take Oath—R.S.O. ch. 223, s. 458—Municipal Corporation—Lowering Grade of Highway—Retaining Wall—Maintenance of — Power to Award—Injury to Land—Interference with Access—Compensation.]—The six weeks allowed by s. 465 of the Municipal Act, R.S.O. ch. 223, for an application to set aside an award, run from the publication to the parties of the award.*

The failure of the arbitrator to take the oath required by s. 458 of the same Act is fatal to his award; but when an award is moved against on the ground of such failure, it must be clearly shewn that the applicant was not aware of the omission until after the making of the award.

An arbitrator to whom is referred a claim for compensation for injury to land by reason of the lowering of the grade of the adjoining highway by the municipality, has no power to direct the municipal corporation to maintain a retaining wall.

The arbitrator has power to include in his award compensa-

tion to the land-owner for injury to his land during the progress of the work by interference with the means of access thereto, and also the cost of work done to afford him such access. *Re Burnett and Town of Durham*, 262.

Arbitration Under Municipal Act—Costs—Discretion.]—See MUNICIPAL CORPORATIONS, 5.

Appointment of Arbitrators Under Public Schools' Act.]—See PUBLIC SCHOOLS, 2.

Renewal Lease—Rent on Renewal.]—See LANDLORD AND TENANT, 1.

ASSESSMENT AND TAXES.

1. *Railway Company—Right of Way—License to Use—Assessment of—Possession—55 Vict. ch. 96 (O).]*—The plaintiffs had a license to use and were using a right of way through the Queen Victoria Niagara Falls Park for their electric railway, under an agreement confirmed by 55 Vict. ch. 96 (O):

Held, that there was an actual, visible, continuous and exclusive possession of the roadway for the profitable use and operation of the railway for a term, and that the company was liable to taxation for the roadbed as an occupant is assessed in respect of property; but the property itself, being in the Crown or held by the public, was exempt.

Judgment of the County Court of York reversed. *Niagara Falls Park and River R. W. Co. v. Town of Niagara*, 29.

2. *Arrears—Landlord and Tenant—Distress for Rent—Custodia Legis—Seizure of Goods—Priorities—R. S. O. ch. 224.*—There is nothing in the Assessment Act, R.S.O. ch. 224, to warrant a municipal tax collector seizing for arrears of taxes, goods, which being under distraint by a landlord, are *in custodia legis*; and in this case subsequent rent having accrued due during the joint possession of the landlord and the collector, the landlord was also held to have priority in respect to another distress made by him for such subsequent rent. *Corporation of City of Kingston v. Rogers*, 119.

3. *Arrears of Taxes—Goods on Premises “Purchased from Owner”—R.S.O. ch. 224, s. 135, s.s. 4 (b).*—Goods purchased from a mortgagee of the owner or person assessed are not goods title whereof is claimed by purchase from the “owner or person assessed,” within the meaning of s. 135, s.s. 4 (b) of the Assessment Act, R.S.O. ch. 224, and cannot be levied on for taxes in arrear in respect of the premises owned by the mortgagor of the goods. *Horsman v. Municipal Corporation of City of Toronto*, 301.

Claim for Taxes Against Company in Liquidation—Right to Prove for. See COMPANY, 4.

ASSIGNMENT AND PREFERENCES.

Examination of Insolvent Debtors—County Court Judge—Power to Commit—R. S. O. ch. 147, ss. 34, 36—Prohibition—Appeal.—A County Court Judge has no jurisdiction to commit an insolvent debtor for unsatisfactory answers on his examination under the Assignments and Preferences Act, R. S.O. ch. 147, ss. 34, 36. *In re Rochon*, 122.

Salaries of Officers of Companies.—See COMPANY, 2.

BANKS AND BANKING.

1. *Certified Cheque—Alteration of—Clearing House—Notice—Liability.*—A person having \$10.25 to his credit at the Bank of Hamilton in Toronto, drew a cheque for \$5, which he presented at that bank and had it certified to. The cheque had no figures before the dollar mark, and on the line for the written amount the word “five” was written, a long space being left between it and the word “dollars.” He then altered the cheque by writing the figures “500” after the dollar mark and the word “hundred” after the word five,

and taking the cheque so altered, deposited it at the Imperial Bank in Toronto, and opened an account there getting three cheques on that bank marked good, namely, for \$300, \$150, and \$50, drawing out the amount of the \$300 cheque, and negotiating the other two. The altered cheque was sent by the Imperial Bank, Toronto, to the Clearing House there, and under the system in vogue, it was charged against the Bank of Hamilton. On the following morning, on the Bank of Hamilton discovering that no cheque for \$500 had been debited to the drawer's account and that a forgery had been committed, immediately notified the Imperial Bank, and demanded repayment of \$495, being the difference between the \$500 and the \$5 which had been debited to the drawer. Under the system in force the forgery would not be discovered until the following morning after the cheque was received from the Clearing House, but there was evidence that under a different system it might have been discovered sooner:—

Held, that the plaintiff was entitled to recover. *Bank of Hamilton v. Imperial Bank*, 100.

BENEVOLENT SOCIETIES.

1. *Incorporation of* — *By-laws*—*Amendments to Consti-*

tution—*Liability to Pay*—*Assessments*—*Suspension*—*Withdrawal from Membership*—*Notice of Assessments*—*R.S.O. 1877, ch. 167*—*R.S.O. ch. 211, ch. 203, s. 164*—A Benevolent Society incorporated under R.S.O. 1877, ch. 167, attached to the declaration which they filed under section 2 (5), a printed book stated to contain a copy of the constitution and by-laws by which the said Society was to be governed:—

Held, that the constitution and by-laws thus included in the declaration became by virtue of section 2 (1) (R.S.O. ch. 211, section 3 (1)), a part of the organic law of the Society, and changes made in the by-laws in accordance with the provisions of such constitution were valid and binding.

Held, also, that the mere fact of a person being a member of such a Society so constituted or of its beneficiary department, raises no implied contract that he will pay the dues and assessments which according to the rules of the Society afterwards become due; and that in the absence of such a contract on his part, there is no obligation to pay for breach of which an action against him will lie.

No such contract is implied in an agreement by an applicant for a beneficiary certificate, contained in his application, that compliance on his part with all the laws, regulations, and re-

quirements which were or might be thereafter enacted by the order was the express condition on which he was to be entitled to participate in the beneficiary fund.

Liabilities may be imposed upon members by changes in the constitution and by-laws of the Society, which did not exist when they became members.

R.S.O. ch. 203, s. 164, does not create a personal liability to pay assessments where none exists apart from it.

Held, also, that a suspended member is none the less a member of the Society; and where there is a personal liability on his part to pay dues or assessments, that liability continues notwithstanding the suspension, not only as to dues and assessments payable at that time, but also as to those which become payable during the suspension and before, by the operation of the rules, his default results in his ceasing to be a member.

Held, also, that all conditions prescribed by the constitution in order to withdrawal from membership must be rigorously observed.

Notice to members of an assessment is not sufficiently proved by the fact that the official paper of the Society was distributed by a distributing agency, without proof of delivery by the latter to the individual members.

Certain clauses in the con-

stitution of the Society construed. *In re The Ontario Insurance Act, and The Supreme Legion Select Knights of Canada*; 154.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Indorsing Before Payee—Liability.*—The defendant put his name on the back of a promissory note before it was endorsed by the plaintiffs, the payees; who then endorsed it "without recourse," and sued him on it:—

Held, that he was not liable either as endorser or as surety or otherwise. *Canadian Bank of Commerce v. Perram*, 116.

2. *Conditional Sale of Goods—Loss of Goods by Fire—Liability.*—The plaintiffs sold and delivered certain machinery to the defendant, receiving part of the price in cash and part in notes, and by the contract of sale it was provided that no property in the machinery should pass to the defendant until it was paid for. The machinery was destroyed by fire before the notes were paid. In an action on one of the notes:—

Held, that the defendant had the possession and use of the machinery and an interest in it; that there was not a total failure of consideration for the note or a partial failure which was ascertained, and that the plain-

tiffs were entitled to recover.
The Goldie and McCulloch Co. (Ltd.) v. Harper, 284.

BOARD OF HEALTH.

Delegation of Power to Cancel Licenses.]—See MUNICIPAL CORPORATIONS, 8.

BRITISH NORTH AMERICA ACT.

Management and Sale of Public Lands—Timber Licenses—Trade and Commerce.]—See CROWN, 3.

Sec. 91, s.s. 24; *ib.* s. 109.]—See CONSTITUTIONAL LAW.

BY-LAWS.

Benefit Society—Power of Revocation of Insurance Benefits—Ontario Insurance Act.]—See INSURANCE, 2.

Fire Limits By-law—Action for Breach of—Penalty.]—See MUNICIPAL CORPORATIONS, 3.

Regulation of Hawkers—Ultra Vires.]—See MUNICIPAL CORPORATIONS, 6.

Transient Traders—Trading Stumps.]—See MUNICIPAL CORPORATIONS, 9.

Submission to Electors—Voters' List—Quashing.]—See MUNICIPAL CORPORATIONS, 2.

Borrowing Money on Credit of Municipality.]—See MUNICIPAL CORPORATIONS, 10.

CASES.

Amsden v. Kyle, 9 O.R. 439, distinguished, 175.]—See WILL, 1.

Blackley v. Toronto Street R. W. Co., 27 A.R. at p. 44, n., followed, 610.]—See MUNICIPAL CORPORATIONS, 4.

Croft and Town of Peterborough, In re, 17 A.R. 21, followed 108.]—See MUNICIPAL CORPORATIONS, 2.

Crothers v. Crothers, 1 P. & D. 568, specially referred to, 321.]—See ALIMONY.

Ellis v. Lynn and Boston R. R. Co., 160 Mass. 341 applied, 309.]—See STREET RAILWAY.

Finlay v. The Bristol and Exeter R. W. Co., 7 Ex. 409 discussed and followed, 40.]—See COMPANY, 1.

Freeman v. Read, 9 C.B.N.S. 301 specially referred to, 695.]—See SESSIONS, 2.

Goodman v. Boyes, 17 A.R. 528 followed, 573.]—See LIMITATION OF ACTIONS, 2.

Hobson v. Gorringe, [1897] 1 ch. 192, remarked upon, 142.]—See INSURANCE, 1.

Hughes v. Coles, 27 Ch. D. 231, followed, 504.]—See LIMITATION OF ACTIONS, 1.

Liles v. Terry, [1893] 2 Q.B. 679, followed, 414.]—See GIFT.

Mingeaud v. Parker, 21 O.R. 267, 19 A.R. 290, applied and followed 314.]—See INSURANCE, 2.

Morley v. Loughnan, [1893] 1 Ch. 736, followed, 414.]—See GIFT.

Percy v. Glasco, 22 C.P. 521, followed, 227.]—See LIBEL, 1.

Pounder and Village of Winchester, In re, 19 A.R. 684, followed, 108.]—See MUNICIPAL CORPORATIONS, 2.

Queen v. Nurse, 2 Can. Crim. Cas. (Tremear) 57, approved of, 150.]—See EVIDENCE, 1.

Regina v. McFarlane, 17 C. L.T. Occ. N. 29, followed, 224.]—See MUNICIPAL CORPORATIONS, 6.

Rhodes v. Bate, L.R. 1 Ch. 252, followed, 414.]—See GIFT.

Rogers v. Ingham, 3 Ch. D. 351, followed, 112.]—See MORTGAGE, 1.

Woodward v. Sarsons, 10 C. P. 733, followed, 108.]—See MUNICIPAL CORPORATIONS, 2.

CHEQUES.

Alteration of — Clearing House.]—See BANKS AND BANKING, 1.

CLEARING HOUSE.

Altered Cheque — Liability.]—See BANKS AND BANKING, 1.

COMPANY.

1. *Landlord and Tenant—Verbal Agreement—Yearly Tenancy—Holding Over—Want of Corporate Seal—Executory Contract—Use and Occupation.*]—There is a broad and well marked distinction between contracts executed and contracts executory in the case of incorporated companies whether trading or not, and where a contract is executory a company is not bound unless the contract is made in pursuance of its charter or is under its corporate seal.

The defendant company who had occupied certain premises under a verbal agreement and paid rent for a year continued in possession after the year and then went out paying rent for the time they were actually in possession.

Held, that as there was no lease under seal, the company were not liable as tenants from year to year but only for use and occupation while actually in possession.

Finlay v. The Bristol and Exeter R.W. Co. (1852), 7 Ex. 409, discussed and followed.

Judgment of the County Court of the County of York reversed. *Garland Manufacturing Co. v. Northumberland Paper and Electric Co., (Ltd.)*, 40.

2. *Assignment for the Benefit of Creditors—President and Vice-President — Wages—Pri-*

ority.]—Claims for arrears of salary, made by persons occupying the position of president and vice-president of a company, such salary being made payable under resolutions duly passed therefor, are valid; and upon the liquidation of the company are payable in priority to the claims of the general body of creditors. *Fayne v. Langley*, 254.

3. *Directors—Invalid Resolution—Payment of Creditors.*—By the by-laws of an incorporated company the board of directors was to consist of three persons, two of whom constituted a quorum. At a meeting, at which two of the directors, C. and G., the plaintiff, were present, one being the president and the other the secretary of the company, a resolution was passed that "The matter of the compensation of C., the editor, and G., the advertising solicitor, of the company was considered, and the sum of \$1,000 each be ordered to be placed to their respective credits in the books of the company for services rendered during the year 1895 in addition to their regular salary, and to be charged to their salary account." C., as a matter of fact, had not been appointed editor, or G., as advertising solicitor, the object of the resolution being to appropriate all the funds of the company, and to prevent a stockholder, who owned the greater part of the

stock, and had made a claim against the company, being paid:

Held, that the resolution could not be sustained, nor could any moneys received under it be retained. *Gardner v. Canadian Manufacturing Publishing Co., Limited*, 488.

4. *Liquidation—Taxes and Water Rates—Right to Prove For*—35 Vict., ch. 80, ss. 11, 13 (O.); 42 Vict., ch. 78, s. 7 (O.).—The right to prove a claim for taxes against an incorporated company in liquidation depends upon the right to maintain an action therefor, which right of action only exists when the taxes cannot be recovered in any special manner provided for by the Assessment Act, as, for example, by distress, or sale of the land.

Where, therefore a claim was made for arrears of taxes against a company in liquidation, and it was shewn that before the date of the winding-up order the taxes might have been, but were not, recovered by distress, the claim was disallowed.

A board of water commissioners, by s. 11 of 35 Vict., ch. 80 (O.), were empowered to fix the water rates payable by the owner or occupant of any house or land which were to be a charge thereon; and by section 13 to make and enforce all necessary by-laws for the collection thereof, and for fixing the time or times and the places for pay-

ment, which, on default, was to be enforced by shutting off the water, suit at law, or distress and sale of the occupant's goods. The rights and powers of the water commissioners, including the right to pass the necessary by-laws, were transferred to the municipal corporation of a city by 42 Vict., ch. 78, and by s. 7, uncollected water rates were made a lien on the premises and collectable by sale thereof. A by-law was duly passed by the corporation fixing the rates to be paid, and the company were from year to year duly assessed therefor :

Held, reversing the judgment of the local Master, that a corporate liability was imposed on the company to pay such rates and a claim therefor constituted, on which the corporation could prove as ordinary creditors. *In re The Ottawa Porcelain and Carbon Company, Limited*, 679.

CONDITION PRECEDENT.

Separate Covenant—Divisible Contract—Sale of Machine.]—*See* CONTRACT 2.

CONDITIONAL SALE.

Loss of Goods by Fire.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

CONSTITUTIONAL LAW.

Indians and Lands Reserved for Indians — Surrender of Indian Lands—Special Pro-

visions in Treaty of Surrender — Crown Patent — Precious Metals—B.N.A. Act, s. 91, s.s. 24, ib., s. 109—Acquiescence of Government.]—A treaty of surrender of Indian territory to the Dominion of Canada in 1873, provided that certain lesser reserves in the lands surrendered, were to be defined and set apart, and thereafter to be administered and dealt with, and with the consent of the Indians first obtained, sold, leased, or otherwise disposed of by the Dominion for the benefit of the Indians. Part of one of these lesser reserves so set apart, and situate in the Province of Ontario, was in 1886 surrendered to the Queen under the Indian Act of 1880, 43 Vict., ch. 28 (D.), in trust to sell the same upon such terms as the Dominion might deem most conducive to the welfare of the Indians; and of this, the lands in question were patented by the Dominion to the plaintiffs, including the precious metals therein. The defendants asserted title in fee to the same lands by virtue of an Ontario patent of 1899. It appeared that in negotiating the treaty in 1873, the Dominion commissioners represented to the Indians that they would be entitled to the benefit of any minerals that might be discovered on any of the lesser reserves to be thereafter delimited :

Held, that after the surrender in 1886, title to the land and to

the precious metals therein could be obtained only from the Crown as represented by the Province of Ontario. With the royal mines and minerals the Indians had no concern; nor could the Dominion make any valid stipulation with them which could affect the rights of Ontario.

Semble, a Province is not to be held bound by alleged acts of acquiescence of various departmental officers which are not brought home to or authorized by the proper executive or administrative organs of the Provincial government, and are not manifested by any order in council or other authentic testimony. *The Ontario Mining Co. v. Seybold*, 386.

Timber Licenses — Manufacturing Condition.] — See CROWN, 3.

CONTRACT.

1. *Agreement not to Practice Medicine—Breach of—Right to Damages and Injunction.*]—By an agreement under seal, the defendant, a physician and surgeon, sold his land and premises and his medical practice in a village, with the good-will thereof, to the plaintiff for \$2,100, and bound himself in the sum of \$400 to be paid to the plaintiff in case he should set up or locate himself within five years within a radius of five miles of the village:—

Held, the plaintiff was en-

titled to damages for breach of the agreement, and also to an injunction restraining him from further breaches. *Snider v. McKelvey*, 91.

2. *Sale of Machine—Condition Precedent—Separate Covenant — Divisible Contract — Breach.*]—An agreement for the sale of a machine provided that the inventor should personally inspect the placing and setting of it in operation. The machine was delivered, but the inventor refusing to go, the vendors sent another competent person to set it up:—

Held, that the vendors were nevertheless entitled to recover the price on the principle that the stipulation alleged did not go to the whole root and consideration of the contract, and, therefore, was not to be considered as a condition precedent but as a distinct covenant, the breach of which could be satisfied by damages. *Cowan v. Fisher*, 426.

3. *Municipal Corporations—Erection of Municipal Buildings—Reference—Division of Questions of Law and Fact—By-law—Waiver of — Plans and Specifications—Incorporation into Contract.*]—On a reference of the matters in question in an action, unless the line between the questions of law and fact is clear and distinct, it is unadvisable to divide up the reference by first directing the evidence to the legal liability,

leaving the quantum of damages and all other matters to be afterwards disposed of.

An objection as to the want of proof of a by-law authorizing a contract for the erection of municipal buildings, raised for the first time at the close of a reference of the action to recover a balance alleged to be due, was overruled, where the existence of the contract was alleged in the statement of claim and defence, and the contract was identified by the mayor on the application for the reference by the defendants and made part of the defendants' material, and treated as the contract throughout the whole reference, and on which large sums of money had been paid under by-laws passed therefor.

Leave to amend so as to set up such objection refused.

Plans and specifications drawn for the erection of buildings—the specifications being divided under the headings, "notes," "conditions" and "specifications,"—referred to in the contract, and initialled by the parties thereto, all bound up together and forming one document, must be read together as constituting one entire contract. *Ryan v. Corporation of the Village of Carleton Place*, 639.

Not to Engage in Business—Working Without Remuneration.—See COVENANT.

Exchange of Land — Land

out of Jurisdiction—Jurisdiction.—See SPECIFIC PERFORMANCE.

CONVICTION.

Ontario Summary Convictions Act—Appeal from Order Dismissing Complaint.—See SESSIONS, 1.

Negating Exception—Hawker By-law.—See MUNICIPAL CORPORATIONS, 6.

Obstructing License Inspector—Inspector taking Stranger with Him.—See INTOXICATING LIQUORS, 1.

COSTS.

Arbitration under Municipal Act—Discretion.—See MUNICIPAL CORPORATIONS, 5.

Sessions—Taxation of—Formal Order.—See SESSIONS, 2.

COUNTY COURT APPEAL.

1. *Order of Judge—Finality.*—An order of the Judge of a County Court discharging the defendant from arrest under a *ca. sa.* is not in its nature final within the meaning of sec. 52 of the County Courts Act, R.S.O. ch. 55, and an appeal does not lie therefrom. *Gallagher v. Gallagher*, 172.

2. *Setting Down — Time — Computation*—"Judgment, Order or Decision"—Settlement—Power of Judge to Resettle.]

—The County Courts Act, R.S.O. ch. 55, by sec. 57 provides that “the appeal shall be set down for argument at the first sittings of a Divisional Court of the High Court of Justice which commences after the expiration of one month from the judgment, order or decision complained of”:—

Held, that the month begins to run from the date of the judicial opinion or decision, oral or written, pronounced or delivered, and the judgment or order founded upon it must be referred to that date.

If such opinion or decision is not pronounced or delivered in open Court, it cannot be said to be pronounced or delivered until the parties are notified of it.

Quere, whether, after a judgment has been settled and entered, the Judge has power to resettle it. *Fawkes v. Swayzie*, 256.

3. *Inability of High Court to Extend Time.*]—The provisions of secs. 55 and 56 of the County Courts Act, limiting the time in which an appeal from the County Court to the Divisional Court must be set down are peremptory, and there is no power to dispense with such provisions, or to enlarge the time for setting down the appeal.

Where, therefore, a Judge of a District Court refused to certify the pleadings so as to enable

an appeal to be set down for the Divisional Court, and an order was obtained from a Judge to allow such an appeal to be set down, such order was held to be of no avail, and the appeal was struck out. *Reekie v. McNeil*, 444.

4. *Verdict of Jury—Term—New Trial—Appeal to Divisional Court.*]—In an action in a County Court tried with a jury, a verdict was given in favour of the defendant. On motion in term the verdict was set aside, and a new trial ordered. The defendant appealed to a Divisional Court:—

Held, that the appeal did not lie. *Irvine v. Sparks*, 603.

Time for Setting Down.]—*See* RAILWAYS, 2.

COUNTY COURT JUDGE.

Examination of Insolvent Debtors—Power to Commit.]—*See* ASSIGNMENTS AND PREFERENCES.

Examination of Judgment Debtor—Division Court—Jurisdiction.]—*See* PROHIBITION.

COURT.

Appeal from County Court—Ca. Sa.—Order of Discharge.]—*See* COUNTY COURT APPEAL, 1.

Appeal from Surrogate Court.]—*See* APPEAL.

Moneys in—Payment out by Mistake—Lapse of Time.—See LIMITATION OF ACTIONS, 3.

COVENANT.

Restraint of Trade—“Engage in the Business”—Breach Action—Parties.—A covenant not to engage or be interested directly or indirectly either by himself, or with, by, or through any other person or persons whomsoever, either as principal or agent, or otherwise howsoever, in the business of a baker within a fixed radius for a certain time is broken by the covenantor assisting the owners of a similar business without remuneration.

One of several joint covenantees, in a covenant in restraint of trade or an incorporated company to whom the interests of the covenantees in the business has been transferred, may, if interested in the good-will, maintain an action for an injunction against the covenantor for breach of the covenant, notwithstanding that the other covenantees have ceased to be interested in the business. *Parnell v. Dean*, 517.

By Infant.—See INFANT.

CRIMINAL LAW.

1. *Evidence — Questioning Prisoner—Statements while in Custody.*—Answers given by a prisoner under arrest in response to the officer in charge, are re-

ceivable in evidence, if the presiding Judge is satisfied that they were not unduly or improperly obtained, which depends upon the circumstances of each case. *Regina v. Elliott*, 14.

2. *Rape — Evidence — Statement of Prosecutrix.*—On a charge of rape it was sought to give in evidence statements made by the prosecutrix on the day following the alleged assault to a police inspector who called upon her with reference to the matter:—

Held, that the evidence was inadmissible. The statements were not made as to the unstudied outcome of the feelings of the woman, nor as speedily after the occasion as could reasonably be expected. *Regina v. Graham*, 77.

3. *Criminal Law—Extortion—Accusation—Information—Criminal Code, secs. 405, 558.*—The word “accuses” in sec. 405 of the Criminal Code, providing for the punishment of any one who, with intent to extort or gain anything from any person, *accuses* that person or any other person of certain offences, includes the accusing of a person by laying an information under sec. 558 of the Code. *Regina v. Kempel*, 631.

Detection of Crime—Constable’s Services—Certified Account.—See MUNICIPAL CORPORATIONS, 12.

CROWN.

1. *Free Grant Lands—Alienation by Agreement—Restraint on—Mistake of Title—Violation of Statute—R.S.O. (1887) ch. 25.*]

—One object of the Free Grants and Homesteads Act, R. S. O. (1887) ch. 25, is to conserve the interest of a wife from being sacrificed by a husband, and alienation of free grant land by the locatee before the issue of the patent being prohibited by the statute cannot be accomplished indirectly by entering into an agreement to complete the settlement duties and to convey after the patent is issued.

The doctrine that when the fee is in the grantee there can be no restraint upon alienation, does not apply when the grant is from the Crown.

There can be no mistake of title where a contract of sale is obtained from a locatee of a free grant lot in direct violation of an express statutory provision. *Meek v. Parsons et al*, 54.

2. *Free Grants and Homesteads Act—Sale of Land to Take Effect After Patent—Validity of.*]

—S. 16 of the Free Grants and Homesteads Act, R.S.O. (1887) ch. 25 (now R.S.O. ch. 29, s. 19), which provides that "neither the locatee, nor anyone claiming under him, shall have power to alienate (otherwise than by devise) or to mortgage or pledge any land located as

aforesaid, or any right or interest therein before the issue of the patent," does not prevent an agreement being entered into before the issue of a patent for the grant of land after the issue thereof, and where such agreement was entered into it was enforced after the issue of the patent, and where all the requisites of s. 8 of the Act had been complied with by the locatee.

Judgment of MACMAHON, J., *ante* p. 54, reversed, FALCONBRIDGE, J., dissenting. *Meek v. Parsons*, 529.

3. *Timber Licenses—Renewal—New Regulations—"Manufacturing Condition"—61 Vict. ch. 19 (O.)—Application to Past Sales—Powers of Provincial Legislature—Sale of Public Lands—B.N.A. Act, sec. 92 (5.)]*

—The statute of the Province, 61 Vict. ch. 9 (O.), which enacts that all sales of pine timber which shall be thereafter made, and every license thereafter granted shall be made or granted subject to the condition set out in the Crown timber regulations made by order in council of the 17th February, 1897, that all pine timber cut under such license shall be manufactured into sawn lumber in Canada, is *intra vires* the Ontario Legislature, being an enactment in relation to "the management and sale of the public lands belonging to the Province and of the timber and wood thereon,"

within the meaning of sec. 92 (5) of the British North America Act, and not to "the regulation of trade and commerce," within the meaning of sec. 91 (2).

The above Provincial statute applies not only to future sales of timber, but also to renewals of licenses to cut pine timber granted before it was passed, and which were issued pursuant to the Act respecting Timber on Public Lands, subject to the condition that the licensee should comply with all regulations "that are or may be established by order in council," the holders of which licenses are not entitled to renewals thereof free from conditions coming into force after the issue of the license originally granted. *Smylie v. The Queen*, 202.

Moneys in Court—Custodia Legis—Lapse of Time.]—See LIMITATION OF ACTIONS, 3.

Indian Lands—Title to—Dominion or Province—Acquiescence of—Order in Council.]—See CONSTITUTIONAL LAW.

DAMAGES.

Life Insurance—Premium Payable on Presentation of Policy—Non-acceptance of Policy.]—By an application for a policy of insurance on the defendant's life he bound himself to pay the first premium on the presentation of the policy; but it was also agreed that the com-

pany should not incur any liability until the premium had been actually paid and received by the company. The application was accepted by the company and a policy issued and tendered to the applicant, who refused to accept it:—

Held, that the company could not claim the whole amount of the premium as liquidated damages, but were entitled to such damages only as had been occasioned by the defendant's refusal to accept the policy. *Royal Victoria Life Insurance Co. v. Richards*, 483.

DEVOLUTION OF ESTATES ACT.

Registration of Caution—Devise of Lands—Effect of.]—See EXECUTORS AND ADMINISTRATORS.

DIES NON JURIDICUS.

See TRIAL.

DIRECTORS.

Invalid Resolution—Voting sums inter se—Creditors.]—See COMPANY, 3.

DISTRICT COURTS.

Unorganized Territory—Jurisdiction—Vendors and Purchasers Act—R.S.O. ch. 109, s. 7.]—Notwithstanding anything in R.S.O. ch. 109, s. 7, and R.S.O. ch. 51, s. 185, Judges of District Courts who are local

Judges of the High Court, have no jurisdiction to deal with applications under the Vendors and Purchasers Act, or under the Land Titles Act. *In re Michell and The Pioneer Steam Navigation Co.*, 542.

Appeal — Inability of High Court to extend Time.] — See COUNTY COURT APPEALS, 3.

DITCHES AND WATER-COURSES ACT.

Award — Engineer — Appointment — Revocation — Notice — Jurisdiction — Estoppel — Appeal.] — By s. 4 (1) of the Ditches and Watercourses Act, R.S.O. ch. 285, it is provided that "every municipal council shall name and appoint by by-law (Form A.) one person to be the engineer to carry out the provisions of this Act, and such engineer shall be and continue an officer of such corporation until his appointment is revoked by by-law (of which he shall have notice) and another engineer is appointed in his stead, who shall have authority to commence proceedings under this Act or to continue such work as may have been already undertaken."

The defendants' council duly appointed R. such engineer, and he accepted the office. Subsequently they, without any notice to him, and without any by-law expressly revoking his appoint-

ment, duly passed a by-law purporting to appoint S. as such engineer; the latter by-law in no way referring to the former or to R.:—

Held, that the prior appointment had not been revoked: that S. did not become "the engineer;" and that an award purporting to be made by him as such engineer under the Act was invalid.

S. was not *de jure* the engineer, because R.'s appointment had not been revoked by by-law, either with or without notice to him; nor could the defendants assert that S. was *de facto* the engineer, for he had not the reputation of being the engineer.

Quere, whether the notice required is one of intention to revoke or of having revoked.

Held, also, even supposing that consent could confer jurisdiction, or that the plaintiffs might waive or be estopped from urging an objection to S.'s jurisdiction, that there was no reasonable evidence of any such consent, waiver, or estoppel; for the plaintiffs' requisition called for "the engineer," and they were ignorant that R. had not been properly superseded. The point was raised upon an appeal against the award and was overruled; but, as it went to the root of the jurisdiction of the whole proceedings, including such appeal, there was nothing in such proceedings which could prevent a consideration of the

question now. *Turtle v. Town-ship of Euphemia*, 404.

DIVISION COURTS.

1. *Trial — Adjournment — New Trial—Motion for—Commencement of Fourteen Days.*]—Where at the sittings of a Division Court a case is "adjourned for plaintiff on payment of costs within ten days otherwise judgment for the defendant," the two weeks within which a motion can be made for a new trial, the costs not being paid, does not commence to run until the expiration of the ten days, for until then there is no judgment. *Thompson v. McCrae*, 674.

2. *Judgment Obtained by Fraud — Jurisdiction — Power to Set Aside.*]—A Judge in an action in the Division Court, apart from the jurisdiction conferred by section 152 of the Division Courts Act to grant a new trial within fourteen days thereby prescribed, has not any inherent jurisdiction to set aside a judgment by reason of its having been procured by fraud and to order a new trial. *Re Nilick v. Marks*, 677.

DIVISIONAL COURT.

Appeal to—County Court.]—See COUNTY COURT APPEALS, 4.

DIVISION COURT.

Judgment Debtor—Commit-

tal—Government Official.]—See PROHIBITION.

DOWER.

Election—Will.]—See WILL, 1.

EQUITY OF REDEMPTION.

Sale of—Assignment of Purchaser's Covenant—Exhaustion of Remedies.]—See ESTOPPEL.

ESTOPPEL.

Res Judicata — Reported Reasons for Judgment—Premature Action—Second Action for Same Cause—Sale of Equity of Redemption—Assignment of Purchaser's Covenant—Exhaustion of Remedies.]—The plaintiff, a mortgagee, took from the defendant, a mortgagor, an assignment of the covenant of a purchaser of the equity of redemption to pay off the mortgage, and on receiving certain securities from him agreed not to sue him until certain other remedies against sub-purchasers had been exhausted. The plaintiff then sued the defendant on his covenant in the mortgage, but failed in the action on the ground that the remedies mentioned had not been exhausted.

In this action on the same covenant:—

Held, that the Court might properly examine the pleadings, evidence and proceedings at the trial of the former action, and

that the reports of the reasons given for the judgments might be looked at for the purpose of showing what was decided: that the dismissal of an action on the ground that it was prematurely brought is no bar to another action on the same demand after time has removed the objection, and that the plaintiff having before this action was brought exhausted her remedies and made an arrangement with the purchaser of the equity of redemption by which she was placed in the same position with respect to him as she was in before she received these securities mentioned, was entitled to recover from the defendant in this action notwithstanding she had retransferred the securities to the purchaser and agreed not to sue on his covenant, such agreement having reserved the defendant's right to sue the purchaser of the equity of redemption should the covenant be reassigned by the plaintiff to defendant. *Barber v. McCuaig* (2) 593.

EVIDENCE.

Refusal to Answer Question—Criminating Answer—Liquor License Act—Committee.]—The refusal "to answer any question touching the case" in section 115 of the Liquor License Act means any question which may be lawfully put, and which the witness is otherwise bound to answer: and a witness,

on the prosecution of a hotel-keeper for selling liquor on Sunday, who declined to answer whether he, the witness, was at the hotel on the day in question, on the ground that his answer would tend to criminate him, and was committed to gaol by the magistrate until he consented to answer, was ordered to be discharged.

The Queen v. Nurse (1898), 2 Can. Crim. Cas. (Tremear) 57, approved of. *Re Askwith*, 150.

See PATENT OF INVENTION, 1

" CRIMINAL LAW, 1, 2.

Libel—Previous Writings of Plaintiff—Mitigation of Damages—Provocation.]—See LIBEL.

Unlicensed Sale of Liquor—Proof of.]—See INTOXICATING LIQUORS, 1.

Parent and Child—Undue Influence—Presumption.]—See GIFT.

Warranty on Sale of Goods—Parol Evidence—Collateral Agreement.]—See SALE OF GOODS, 2.

Former Conviction—Parol Proof of.]—See INTOXICATING LIQUORS, 2.

EXECUTION CREDITORS.

Payment off of Lien Notes—Liability to Account for.]—See MORTGAGE, 3.

EXECUTORS AND ADMINISTRATORS.

*Judgment against Executors—Endorsement of Note by Executors "Without Recourse"—Devolution of Estates Act—Caution after Twelve Months—Effect of.]—*A judgment against executors of an estate is only *prima facie* evidence of its being for a debt due by the testator as regards the parties interested in his real estate who are at liberty to disprove it.

In an action for administration by a judgment creditor on a judgment recovered on a note discounted by him, which note was received by executors for the sale of personal property of the testator and endorsed "without recourse" to the plaintiff:—

Held, that the endorsement of the note by the executors did not make it a debt of the testator in the hands of the endorsee.

Held, also, that the effect of the Devolution of Estates Act and amendments acted upon by the registration of a caution under an order of a County Judge after the twelve months has expired is to place lands of a testator again under the power of his executors so that they can sell them to satisfy debts, and that the expression "in the hands" of executors as applied to property of the testator is satisfied if it is under their control or saleable at their instance, and that the operation of a devise of lands is by the Act

only postponed for the purposes of administration, and that the estate does not pass through the medium of the executors but by the operation of the devise. *Ianson v. Clyde*, 579.

Claim on—Notice Disputing.]—See VENDOR AND PURCHASER.

FACTORIES ACT.

See MASTER AND SERVANT, 1.

FACTORS ACT.

See SALE OF GOODS, 3.

FIRE INSURANCE.

See INSURANCE.

FOREIGN JUDGMENT.

Action on—Alimony—Defences.]—See FOREIGN LAW.

FOREIGN LAW.

*Judgment Granting Divorce and Alimony—Domicile—Submission to Jurisdiction—Evidence—Production of Foreign Record.]—*An action by a husband, who had been married in Ontario, in a foreign State, for a divorce *a vinculo*, on the ground of the adultery and cruelty of his wife resulted in favour of the latter, and judgment dissolving the marriage

was granted to her, and by it she was awarded a sum of money as alimony. Subsequently the wife sought in this action to recover the amount of the alimony, and it was contended by the husband that as he had never acquired the necessary domicile to give the foreign Court jurisdiction to grant the divorce the judgment was invalid:—

Held, that as he had invoked and submitted to the jurisdiction of the foreign Court, he had precluded himself from setting up want of jurisdiction.

Held, however, were this not so, that in the absence of anything appearing on the face of the foreign proceedings to shew want of jurisdiction the production of the record was *prima facie* evidence entitling the wife to recover in this action, and although the presumption in favour of the judgment might be rebutted, clear proof of the facts to shew want of jurisdiction must be adduced.

Held, also, that the wife was entitled to judgment for payment of alimony, although the amount was arrived at upon a consideration of the value of the lands of the husband in Ontario.

Semble. — Had the foreign judgment provided for the division in specie of the husband's property in Ontario it would not have been invalid.

Judgment of ROBERTSON, J.,

ante §1, reversed.—*Swaizie v. Swaizie*, 324.

FORFEITURE.

Lease — Assignment without leave — Waiver.] — See LANDLORD AND TENANT, 2.

FRAUD.

Landlord and Tenant — Pretended Sale of Goods by Tenant — Illegal Distress — Right of Tenant to Set Up Title to Goods.] — A tenant is not precluded from setting up his title to goods illegally distrained for alleged fraudulent removal because of a pretended sale of them by him, the effect of which was to vest the possession but not the property in the goods in the alleged purchaser. *White-lock v. Cook*, 463.

FRAUDULENT CONVEYANCE.

Husband and Wife — Separate Income — Payment of to Husband — Gift — Presumption.] — A married woman having separate estate paid over her income therefrom to her husband who treated it as his own, and used it towards paying the ordinary family expenses, without keeping a separate account, paying her no interest and giving no acknowledgment, all her business matters being under his management. After many years of this kind of dealing, the hus-

band, who had for some time been largely indebted to the plaintiff, being pressed for payment immediately made a conveyance of his property to his wife without her knowledge, and without her being informed of the fact, the consideration for which it was sought in this action to support by alleging that the payments to the husband had been made as loans:—

Held, that the onus of proof that payments of income to her husband were by way of loan, and not of gift, was on the wife, and that the evidence of both defendants, being without corroboration, did not support the allegation, and the conveyance was set aside as fraudulent against creditors. *Rice v. Rice*, 59.

FREE GRANT LANDS.

Sale of Land to Take Effect after Patent—Validity of.—*See* CROWN, 2.

See, also, CROWN, 1.

GIFT.

Parent and Child—Fiduciary Relationship—Influence—Presumption—Onus—Absence of Independent Advice.—For fifteen years before his father's death the defendant managed his father's business generally, and did all his banking under a power of attorney. After the death of the father,

at the age of 78, in September, 1898, the son claimed a sum of \$20,000, represented by a bank deposit receipt, dated 3rd June, 1898, payable to himself, which he alleged was a gift from his father to himself or his children, and which he obtained by drawing as his father's attorney a cheque for the amount in his own favour upon his father's account. The father died intestate, leaving the defendant and two other children. The sum of \$20,000 represented more than one-fourth of the value of the estate. The trial Judge found that the amount was a gift to the defendant's children, and ordered it into court for their benefit:—

Held, reversing that judgment, that, on grounds of public policy, the presumption was that the gift, even though freely made, was the effect of the influence induced by the confidential relationship which existed, and the onus was on the defendant to shew that his father had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances.

Morley v. Loughnan, [1893] 1 Ch. 736, *Rhodes v. Bate* (1865), L.R. 1 Ch. 252, and *Liles v. Terry*, [1893] 2 Q.B. 679, followed.

The rule is not confined to the case of trustee and *cestui que trust*, but is applicable to every case where confidence has been

reposed, and the fact that the benefit obtained has not been so obtained for the personal benefit of the person in whom the confidence was reposed, does not affect the application of the principle.

Evidence was given to the effect that the deposit receipt was taken in the defendant's name in lieu of a promissory note made by the father in 1895, which itself was a renewal of an earlier note made in favour of the son as a settlement for his children, and that both notes had been destroyed:—

Held, that the notes, if they existed at all for the purpose alleged, were incomplete gifts, not binding upon the deceased or his estate. The hand by which the transfer of the \$20,000 was effected was that of the son, and the ratification rested almost wholly upon the evidence of the son and his wife, who kept the matter a secret until after the death. The father, at the time the transaction was carried out, in June, 1898, was not legally bound to pay his note; he was ill and old; and the only adviser to whom he had recourse was the defendant. Therefore, that time, and not the time when the notes were said to have been given, was the time at which the gift must be taken to have been made, if at all, and at which the effect of the lack of independent advice was to be considered.

Trust & Guarantee Co. v. Hart, 414.

GOOD FRIDAY.

See TRIAL.

HIGH COURT.

See PATENT FOR INVENTION, 1.

HIGHWAY.

Dedication and Acceptance—Registered Plan.—*See* WAY.

HUSBAND AND WIFE.

Separate Estate—Wife's Funeral Expenses.—The separate estate of a married woman is liable for her funeral expenses. *Re Gibbons*, 1.

Foreign Judgment for Alimony—Jurisdiction—Action on.—*See* FOREIGN LAW.

Alimony—Offer to Receive Back—Bona fides.—*See* ALIMONY.

See, also, FRAUDULENT CONVEYANCE.

INDIANS AND LAND RESERVED FOR INDIANS.

Surrender of Indian Lands—Special Provisions in Treaty—Crown Patent—Precious Metals.—*See* CONSTITUTIONAL LAW.

INFANT.

Mortgage—Covenant for Payment—Approval of Master—Mistake—Repudiation—Delay.]—The defendant was one of several *cestuis que trust* who joined with their trustee in a mortgage for the purpose of discharging a lien upon the trust estate. It was recited in the mortgage deed that they had agreed to join therein in order to vest all their interests in the mortgagee, but subject to the terms of the mortgage. The defendant was then an infant under nineteen years of age, but that fact did not appear on the face of the instrument, in which she was made to covenant for payment of the mortgage money. The instrument was marked "approved" by the Master (who had directed the trustee to execute the mortgage) but not by the official guardian. It was stated, however, at the bar that the latter did approve on behalf of the infant, and that some pencil marks on the instrument signified his approval. No order was shewn requiring execution by the infant. Nearly two years after the defendant came of age she was served with the writ of summons in an action by the mortgagee upon the covenant for payment, and, as she did not appear, judgment was signed against her. Two years later she moved to have the judgment set aside:—

Held, that it was contrary to

proper practice to have such a covenant on the part of an infant; and its presence was only to be explained by supposing that the Master's attention had not been called to the fact of infancy. The covenant was void, as the infant had received no benefit from it and had been induced to enter into it *per incuriam*; and the delay was not material—the applicant being ignorant of her rights and not called on to disaffirm what was from the outset to her prejudice. *Brown v. Grady*, 73.

Playing on Highway—Accident—Liability of Municipality—Negligence.]—See MUNICIPAL CORPORATIONS, 4.

Articles of Apprenticeship—Unreasonable hours of work.]—See MASTER AND SERVANT, 3.

Trespass—Dangerous Article near Highway—Accident.]—See NEGLIGENCE.

See also MASTER AND SERVANT, 1.

INSOLVENT DEBTORS.

Examination of—Power to Commit.]—See ASSIGNMENT AND PREFERENCES.

INSURANCE.

1. *Fire Insurance—Mortgage—Reconstruction of Machinery*

in Mill—Rights of First and Second Mortgagees and of Person Furnishing the New Machinery — Marshalling Insurance Moneys — Subrogation.] — The owner of a mill property mortgaged it together with all the machinery, which was declared to be fixtures. Subsequently a second mortgage was executed by the mortgagor on the same property. Both mortgages were made under the Short Form Act, and contained covenants to insure, but the insurance moneys, under the policies effected on the property and machinery, were made payable to the first mortgagee. Afterwards the mortgagor, with the consent of the second, but without that of the first mortgagee, made a contract with the plaintiffs under which they placed new machinery in the mill using, as the contract provided, such of the old machinery as was necessary to complete the equipment, and taking and removing such of the old as was not required, the mortgagor agreeing with the plaintiffs to insure the machinery and assign the insurance to them. On the mill and machinery being destroyed by fire and the insurances adjusted, the second mortgagee paid off the first mortgagee's claim, and procured from him an assignment of his mortgage as well as of his interest in the policies :

Held, that the plaintiffs could not claim, by reason of their

betterment of the machinery, which prior to its reconstruction was deemed of substantial value, that they were entitled to the insurance moneys thereon to the detriment of the claim under the first mortgage; but that they were so entitled as against the second mortgage; and, therefore, after the claim of the assignee of the first mortgage was satisfied, the plaintiffs were entitled as against the second mortgage to be subrogated to the mortgagee's rights thereunder to the insurance moneys to the extent of the insurable value of the machinery put in by them.

Hobson v. Gorringe, [1897] 1 Ch. 192, remarked on with reference to its effect on the decisions in this Province as to fixtures. *Goldie v. Bank of Hamilton*, 142.

2. *Life — Benefit Society — Certificate—Indorsement for Benefit of Wife — Subsequent Revocation by Will — By-laws of Society—R.S.O. ch. 203.*] — A certificate of life insurance issued to a member by a benefit society stated on its face that it was subject to the provisions of the by-laws, rules, and regulations of the society. One of the by-laws provided for the payment of the insurance money to any person nominated by indorsement, which indorsement might be revoked. The member, by indorsement on the certificate, directed that all money accruing

upon it should be paid to his wife upon his death; but, subsequently, by will directed that only a portion of it should be paid to her, and the balance to his half brothers and sisters:

Held, that the insurance was subject to the provisions of the Ontario Insurance Act, R.S.O. ch. 203; and the by-laws and rules of the benefit society, in so far as they were inconsistent with such provisions, were to be regarded as modified and controlled by them. The statute provided in effect that when the indorsement was in favour of the wife of the member, he could not revoke it, and the by-law was in this respect modified and controlled by the statute.

Mingaud v. Packer (1891-2), 21 O.R. 267, 19 A.R. 290, applied and followed. *Re Harrison*, 314.

3. *Life Insurance—Change of Beneficiary—Statutes—Inconsistent Clauses—R.S.O. (1897), ch. 203, ss. 151, 160.*—Where two clauses in a statute cannot be reconciled the latter must prevail over the earlier one.

By s. 151 of the Ontario Insurance Act, R.S.O. (1897), ch. 203, the insured may by an instrument in writing substitute a new beneficiary in a life policy, provided that he does not divert the benefit of any person who is a beneficiary for value. By section 160 he may in like manner transfer the benefit to his wife

alone, although the policy is expressed to be for his mother's benefit, unless the policy expressly states that the original beneficiary is a beneficiary for value.

A person having effected an insurance on his life in favour of his mother as beneficiary, the policy not expressly stating that she was a beneficiary for value, subsequently transferred the benefit of it to his wife alone:

Held, that section 160 must govern and that the wife was entitled to the policy moneys. *Potts v. Potts*, 452.

4. *Fire—Statutory Condition 3—"Change Material to Risk"—Non-occupancy.*—The fact that a dwelling house is unoccupied is not *per se* a "change material to the risk," within statutory condition 3 in a fire policy on household furniture therein. *Boardman v. North Waterloo Insce. Co.*, 525.

5. *Fire—Statutory Conditions—Variation of Condition Requiring Occupation of Premises—"Untenanted."*—A variation of statutory condition 3 in a policy of fire insurance providing that "if the premises insured become untenanted or vacant and so remain for more than ten days without notifying the company," etc., "the policy will be void," is a reasonable condition, and the word "untenanted" therein must be read as synonymous with "unoccupied."

Where, therefore, the occupant of a house ceased to reside in it for several weeks, but left furniture and clothing therein, while a person went there for domestic purposes, and on two occasions the insured's husband slept in the house, it was held that the house was untenanted and vacant within the meaning of the condition. *Spahr v. North Waterloo Ins. Co.*, 525.

6. *Employer's Liability Contract—Alteration after Execution—Foreign Company—Local Agent—Authority—Notice.*]—A local agent of an English insurance company, without authority from any one, upon the request of the assured, and after some correspondence with the chief agent for the company in Ontario as to other changes, which had been refused to the knowledge of the assured, altered an employer's liability policy which had been sent to him for delivery to the assured by making it comprehend the workmen at a place other than those named in the policy, and then handed it to the assured, who paid him the premium. He then sent the premium to the chief agent for Ontario, and advised him at the same time of the alteration made. The power to make any change in the policy did not rest in the local agents, nor in the chief agent for Ontario, but only in the manager and attorney for Canada, who was not notified of the alteration:

Held, that the company could not be held to have authorized the alteration and were not bound by the contract as altered. *Pigott v. Employers' Liability Ass. Corporation*, 666.

Life—Application for Policy—Refusal to Accept Policy.]—*See DAMAGES.*

Life—Bonus Additions—Security for Money.]—*See RECEIVER, 2.*

INTEREST.

Mortgage—Post Diem—Redemption.]—*See MORTGAGE, 1.*

INTOXICATING LIQUORS.

1. *Unlicensed Premises—Search for Liquor—Right of Inspector to take Stranger with Him—Necessity for Warrant—Proof of Liquor being Sold—Liquor License Act, R.S.O. ch. 245, ss. 130, 131.*]—The right of entry under section 130 of the License Act, R.S.O. ch. 245, into any inn, tavern, etc., to make search for liquor, is limited to the persons named therein, namely, "any officer, police constable or inspector;" and it is only under section 131, on the procuring of a warrant as therein provided, that the officer can take with him a person not being one of those so named.

Where therefore a license inspector, in proceeding to search the defendant's premises for liquor took with him a person,

other than one of those so named, without having procured a warrant, his act was illegal, and the defendant was justified in resisting it; and a conviction for obstructing the inspector in the discharge of his duty was quashed.

The defendant's premises had been licensed as a tavern, but the license had expired, and the only evidence of liquor being sold, or reputed to be sold therein, was the statement of the inspector that the defendant's bar-room remained the same as before, *i.e.*, before the expiry of his license.

Per MEREDITH, C.J.—This was not sufficient to satisfy the requirements of the section.

Per MEREDITH, C.J., also.—Under the circumstances of this case an objection that reasonable grounds had not been shewn for suspecting that some violation of the Act was taking place or was about to take place was not tenable. *Regina v. Ireland*, 267.

2. *Former Conviction—Proof of by Parol—R.S.O. ch. 245, s. 101, s.ss. 1 and 2.*—Under s.ss. 1 and 2 of s. 101 of the Liquor License Act, R.S.O. ch. 245, it is not necessary that the proof of the prior conviction should be by the production of the formal conviction or by a certificate thereof, other satisfactory evidence being by the statute declared to be sufficient.

Where, therefore, on a trial before a magistrate who was the

same magistrate by whom the defendant had been previously convicted of a like offence,—the information alleging such prior conviction, and all that appeared with regard to it being the evidence of the license inspector, who proved that the defendant was the person previously convicted:

Held, it must be assumed that the magistrate satisfied himself as to the prior conviction, the inspector's evidence only being necessary to prove the identity of the defendant. *Regina v. McGarry*, 486.

Refusal to Answer Questions—Liquor License Act.—See EVIDENCE.

JUDGMENT.

Appeal from—Time—Settlement of.—See COUNTY COURT APPEAL, 2.

Against Executors—How Far Decisive of Debt.—See EXECUTORS AND ADMINISTRATORS.

LANDLORD AND TENANT.

1. *Renewable Lease—Buildings Erected by Tenant—Absence of Covenant as to—Arbitration—Rent on Renewal—"Ground Rent."*—A renewal lease is a continuation of the old lease, and if rent for buildings erected by the tenant is not provided for under the first lease neither should it be under the extension in the absence of express provision.

An application to refer back an award in a case where a tenant had a renewable lease and had during the original term erected buildings on the premises, there being no provision in the lease as to buildings erected by the tenant, and where the arbitrators in arriving at the rent for the renewed term had fixed a "ground rent" without taking the buildings into consideration, was dismissed with costs. *Re Allen and Nashsmith*, 335.

2. *Lease—Assignment without Leave—Forfeiture—Election—New Lease—Waiver—Distress—Acceleration Clause—Assignment for Benefit of Creditors—Notice under R.S.O., ch. 170, s. 34, s.s. 2—Sale of Goods on Demised Premises—Agreement—Condition—Construction.*—A lease of a store was made for five years, at the yearly rental of \$700, payable by even portions quarterly in advance, with the statutory covenant that the lessee should not assign or sublet without leave, and with a proviso that if the lessee should make an assignment for the benefit of creditors, the then current and the next quarter's rent and the taxes for the then current year should immediately become due and payable as rent in arrear and be recoverable by distress or otherwise. During the term, on the 24th January, 1898, the

lessee made an assignment for the benefit of his creditors to the plaintiff, who sold the stock of goods in the store to the defendant. By the terms of the agreement of sale the defendant was to assume the rent and taxes and to arrange with the landlord of the premises as to tenancy. On the 14th February, 1898, the defendant's husband went into possession of the store and of the stock of goods, which had remained therein, and continued thereafter in possession of the store. On the 5th April, 1898, the lessors distrained the goods of the defendant in the store for \$644, made up of \$175 rent due on the 1st October, 1897, \$175 rent due on the 1st January, 1898, \$175 for "the next quarter's rent," by virtue of the proviso in the lease, and \$119 for the taxes for 1898, in respect of which sums they claimed to be preferred creditors on the estate of the lessee. The plaintiff paid the claim and costs under protest, and brought an action against the lessors to recover back \$319.32 of it, which action was dismissed on the 14th December, 1898.

On the 17th December, 1898, the lessors made a lease of the store to the defendant's husband to hold for three years from the 14th February, 1898.

In this action the plaintiff alleged that he was entitled to be paid by the defendants \$322, being the proportion of the rent

from the 14th February to the 1st July, 1898, which the defendant agreed to assume and pay. At the trial it appeared that the lessors never consented in writing to the assignment of the demised premises to the plaintiff, and that the plaintiff never assigned the premises to the defendant, and that the lessors never recognized as rightful the occupation of the premises by the defendant. The plaintiff did not give notice to the lessors, under R.S.O. ch. 170, s. 34, s.s. 2, electing to retain the store for the unexpired term, or any portion of it:—

Held, that the lessors, by granting the lease of the 17th December, 1898, elected to avoid their former lease, they having done nothing in the meantime to waive the forfeiture thereof incurred by the assignment to the plaintiff. The distress was no waiver of forfeiture, for it was for rent and taxes which became due by virtue of the provisions of the lease on the date of the assignment. The election to forfeit the original lease referred back to the time when the breach of the terms of that lease occasioning the forfeiture took place, that is, the date of the assignment. The plaintiff might have avoided the forfeiture of the lease and the acceleration of the payment of the rent and taxes by giving, within one month from the execution of the assignment, a

notice in writing to the lessors electing to retain the store for the unexpired term or a portion of it.

Held, also, that the condition in the agreement of sale between the plaintiff and defendant, that the latter was to assume the rent and taxes and to arrange with the landlord as to tenancy, did not mean that the defendant was to assume any part of the rent and taxes which by virtue of the provision of the lease had become due on the previous 24th January, but rather that the defendant should arrange with the landlord as to tenancy and assume the rent and taxes payable in virtue of the tenancy so arranged. *Tew v. Routley*, 358.

Distress for Rent—Custodia Legis—Taxes—Priority.—See ASSESSMENT AND TAXES, 2.

Pretended Sale of Goods by Tenant—Right of Tenant to set up Title.—See FRAUD.

See COMPANY, 1.

LIBEL.

Evidence — Admissibility—Previous Writings — Provocation — Mitigation of Damages — Meaning of Words.—In libel for two articles which were printed in the defendant's newspaper reflecting upon the character and conduct of the plaintiff:—

Held, that an article in another newspaper, published before the first of the alleged libels, purporting to be an account of an interview with the plaintiff in which he made an attack upon the defendant's newspaper by its name, and a letter signed by the plaintiff, published in two newspapers before the second of the alleged libels, in which the defendant's newspaper and the editor thereof—not the defendant himself—were referred to in abusive language, were admissible in evidence upon the part of the defendant, in mitigation of damages.

Percy v. Glasco (1873), 22 C. P. 521, followed.

Held, also, per ROSE, J., that editorial articles which appeared on the same day in the newspapers which published the plaintiff's letter, referring to it and to the defendant's newspaper, were also admissible as furnishing provocation for the second of the alleged libels; MEREDITH, C.J., contra.

In the first of the alleged libels one of the statements made about the plaintiff was "that during an election campaign the party managers had to lock him up to keep him from disgracing them on the stump:"—

Held, that evidence was admissible on the part of the defendant to explain the meaning of the words "lock him up." *Stirton v. Gummer*, 227.

LIEN.

1. *Mechanics' Lien—Twenty Per Cent. Reserve—Payment before Expiry of Thirty Days—R.S.O. ch. 153, sec. 11.*]—The owner of a building is not prohibited from making payments, before the expiry of the thirty days from completion out of the twenty per cent. reserve required by R.S.O. ch. 153, sec. 11, to persons entitled to liens, but he makes such payments at his own risk as against anyone ultimately prejudiced by such payment. *Torrance v. Cratchley*, 546.

LIEN NOTES.

Sale of Machine — Payment off of — Rights of Execution Creditors.]—See MORTGAGE, 3.

LIFE INSURANCE.

Benefit Society—Certificate—Indorsement—Subsequent Revocation.]—See INSURANCE, 2.

LIMITATION OF ACTIONS.

1. *Lunatic—Annuity by Will—Charge on Lands—Arrears.*]—A testator who died in 1872, by his will devised land to two of his sons, their heirs and assigns forever, subject to the payment of \$200 per annum for the benefit of another son (a lunatic) for his life, payable to the person who might be his guardian. Payments were made

to the mother for the support of the lunatic son from 1880 to 1889, the last of which was made in February, 1889. The plaintiffs were appointed committee for the son in December, 1898:—

Held, that the annuity was charged on, and that the right to recover out of, the land was not barred as to future payments.

Hughes v. Coles (1884), 27 Ch. D. 231, followed.

Held, also, that the payments made were discharges *pro tanto* of the annuity.

Held, also, that as the son was under disability until the plaintiff's appointment, and as the action was brought within twenty years they were entitled to recover the annuity from February, 1890, and the annuity being an express charge on the land it might be sold to satisfy the arrears. *Trust & Guarantee Co. v. Trust Corporation of Ontario*, 504.

2. *Acknowledgment in Writing — Revival of Liability — Agent of Executor — Letter to Third Person — Admissibility.* — The executor of the will of one of the joint makers of a promissory note proved the will after the debt on the note as against the testator or his estate had become barred by the Statute of Limitations. The will directed that all the testator's just debts should be paid by his

executors as soon as possible after his death. The executor, who lived out of Ontario, executed a power of attorney to the other joint maker of the note, who was primarily liable on it, and against whom it had been kept alive by payments, to enable him in Ontario "to do all things which might be legally requisite for the due proving and carrying out of the provisions" of the will—the executor having at this time no knowledge of the note:—

Held, that a letter written by the surviving maker shortly after the execution of the power of attorney, even if in its terms sufficient, was not such an acknowledgment, within R.S.O. ch. 146, sec. 1, as would revive the liability; for there was no trust created by the will for the payment of debts, nor was there any legal obligation on the part of the executor to pay statute-barred debts, and the surviving maker was not an agent "duly authorized" to exercise the discretion which an executor has to pay such debts.

Three years later the executor wrote to the holder of the note to the effect that the holder ought to look to the surviving maker for payment, as he was now doing well:—

Held, that this was not such a recognition as amounted to a promise or undertaking to pay.

Just before this action was brought, the executor wrote to

the plaintiff's solicitors asking them not to take any further step till he could hear from the surviving maker; and to the latter he wrote: "The debt is owing and they are anxious to get their estate settled up:"—

Held, insufficient as an acknowledgment, and that the letter to a third person—not the creditor—was not admissible.

Goodman v. Boyes (1890), 17 A.R. 528, followed.

King v. Rogers, 573.

3. *Moneys in Court—Payment Out by Mistake—Lapse of Time—Restitution.*]—Statutes of limitation have relation only between subject and subject—the Crown cannot be bound by them.

The Supreme Court of Judicature for Ontario is a public trustee as to all moneys and securities in its hands. Moneys in Court are *in custodia legis*, in this case tantamount to *custodia Regis*, and to such a fund and such a custodian the Statute of Limitations has no pertinence.

Suitors and claimants are not barred by any lapse of time in their application for payment out of moneys to which they are entitled, and reciprocally they should not be protected by lapse of time from making restitution, if they have improperly or fraudulently received moneys from the Court to which they have no just claim.

Restitution was ordered after a period of fourteen years, without interest, as the mistake was that of an officer of the Court.

Where moneys in Court have been improperly paid out in an action, a motion to refund the amount is the proper procedure. *Allstadt v. Gortner*, 495.

Claim Against Administrator.]—See VENDOR AND PURCHASER.

LIQUOR LICENSE ACT.

See INTOXICATING LIQUORS.

MASTER AND SERVANT.

1. *Factories Act—Child Labour—Accident—R.S.O. ch. 256, ss. 5, 7, 8, 9.*]—The employment of a child under fourteen years of age in a factory at work other than of the kinds specified in section 5 of the Factories Act, R.S.O. ch. 256, as proper for children, though it subjects the employer to a penalty, does not give rise to an action for damages, unless there be evidence to connect the violation of the Factories Act with the accident. *Roberts v. Taylor*, 10.

2. *Foreman—Negligence—Evidence.*]—A plank forming part of the scaffold being used in the erection of a house had been securely placed in position under instructions of the contractors' general superintendent.

Late one afternoon two workmen of their own accord removed the stay on which one end of the plank had rested, and replaced it about a foot higher in an insecure fashion. Early the following morning, to carry out instructions of the foreman, the plank was replaced on the stay by fellow-workmen in the presence of the plaintiff, and when the plaintiff was mounting on it the stay gave way, and he fell and was injured:—

Held, that there was no evidence of negligence on the part of the foreman.

Reversed on appeal. *Kelly v. Davidson*, 521.

3. *Articles of Apprenticeship — Unreasonable Provision — Non-liability.*—Articles of apprenticeship which require the apprentice during the term of four years of three hundred and ten working days of ten hours each, to give and devote to a firm, to whom he is apprenticed, ten hours each working day, or such number of hours as may be the regulation of the workshop for the time being, or as special exigencies of the business may require, are unreasonable and cannot be enforced against the infant, nor against a surety for him. *MacGregor v. Sully*, 535.

MECHANICS LIEN.

See LIEN.

MISTAKE.

Money Paid Under—Recovery Back—Railway Fares.—See RAILWAYS, 2.

Money Paid Under—Mortgage—Interest.—See MORTGAGE, 1.

MONEYS IN COURT.

Payment Out by Mistake—Lapse of Time.—See LIMITATION OF ACTIONS, 3.

MORTGAGE.

1. *Redemption—Interest post Diem—Excessive Payment—Application on Principal—Mistake.*—A mortgage having properly borne interest at eight per cent. during its currency, and this having been regularly paid, the parties went on after the mortgage fell due, the one paying and the other receiving the eight per cent. for a long period, in ignorance that the liability was to pay only six per cent. Seven annual payments of interest were thus made after maturity at the mortgage rate, and subsequently some payments at a lower rate, the mortgage money not being called in meantime. All the receipts given stated that the payments made were on account of interest. Both parties were ignorant of the law on the subject, and believed that the mortgage rate

would continue until payment of the principal:—

Held, that the money could not be recovered back by the mortgagor as money paid under a mistake, nor could the excess of interest be applied in reduction of the principal in a redemption action.

Rogers v. Ingham (1876), 3 Ch.D. 351, followed. *Stewart v. Ferguson*, 112.

2. *Fraud of Solicitor—Assignment of Mortgage—Liability.*—The plaintiff, for the purpose of raising a portion of the purchase money on a contemplated purchase of property, mortgaged lands then owned by him to the defendant C., the money being received by a solicitor who acted for both parties. The purchase not having been carried out, the plaintiff desired to have the mortgage discharged, whereupon the solicitor, who had misappropriated the moneys, paid the mortgagee and fraudulently procured from her an assignment of the mortgage to himself which he assigned to the defendant P., who advanced the money thereon in good faith and without any knowledge of the fraud:

Held, that the plaintiff was entitled to a re-conveyance of the property released from the mortgage, and that the loss must be sustained by the defendant P., who took nothing under the assignment to him, for the

mortgage being paid off, the solicitor acquired no beneficial interest, being at most but a trustee of the legal estate, and could pass no better title to his assignee. *McCormick v. Cockburn*, 436

3. *Execution Creditors—Mortgage Sale—Application of Surplus—Payment off of Lien Notes—Liability to Account for Notes.*—A part owner of a farm joined in promissory notes as surety for the purchaser of a machine, and also gave a lien on his share of the land as further security. Subsequently his interest passed to his co-owner, of whom the plaintiffs were execution creditors under judgments subsequent to the lien. The defendants, being mortgagees of the whole farm prior to the lien, afterwards sold under their power of sale, and out of the proceeds paid off the lien, and the notes were assigned in 1894 by them to an execution creditor subsequent to the plaintiffs who held them till 1898, and then sued on the notes without result, as the maker had become insolvent. It was shown that if the maker had been sued in 1895, by which time the notes had become payable, the amount of them would have been recoverable:—

Held, that the notes were not paid by the application of the proceeds of the sale in discharge of the lien at a time when they

had not matured, the payment not having been made by the party primarily liable, the lien being given as a security only, and that the defendants should have secured the notes for the execution creditors generally, and were bound to account to the execution creditors for the amount paid in respect of them to the vendors of the machine, though under the circumstances without interest. *Glover v. Southern Loan and Saving Company*, 552.

Sale of Equity of Redemption—Assignment of Purchaser's Covenant.—See ESTOPPEL.

Conveyance of Equity by Mortgagor—Subsequent Expropriation Proceedings by Railway Company.—See RAILWAY, 4.

Sale Subject to—Indemnity.—See VENDOR AND PURCHASER.

On Mill and Machinery—Priorities—Subrogation.—See INSURANCE, 1.

Purchaser of Equity—Covenant to Indemnify.—See RECEIVER, 1.

MUNICIPAL CORPORATIONS.

1. *By-law Exempting from Taxation—Manufacturing Establishment—Cessation of Business—R.S.O. ch. 184, s. 366.*—R.S.O. ch. 184, s. 366, which gives municipal councils power

to exempt manufacturing establishments from taxation, does not authorize such exemption when such establishments cease under liquidation to carry on business, and any exempting by-law will, in such event, cease to be operative. *Polson v. The Municipal Corporation of the Town of Owen Sound*, 6.

2. *By-law—Submission to Electors—Voters' List—Omission of Classes of Voters—Irregularity—Saving Clause.*—Farmers' sons and income voters should be included in the voters' lists prepared for the taking of the vote upon a municipal by-law prohibiting the sale of intoxicating liquors in a township under s. 141 of the Liquor License Act, R.S.O. ch. 245, and their omission is an irregularity.

In re Croft and Town of Peterborough (1890), 17 A.R. 21, and *In re Pounder and Village of Winchester* (1892), 19 A.R. 684, followed.

Where all such votes had been omitted from the list by the clerk of the township under the honest supposition that they should not have been placed thereon, but the number of votes so left off was less than the majority by which the by-law was carried, and there was nothing to shew that the result of the error had in any way affected the votes that were cast, or that persons who would otherwise have voted had abstained from doing so on account of the

error, or that there was any other good ground for believing that the result might probably have been different had the list been properly prepared, and it appearing that the election had been conducted in accordance with the principles laid down in the Municipal Act, in that the directions of the Act had not been intentionally violated, the Court refused to quash the by-law.

Woodward v. Sarsons (1875), 10 C.P. 733, followed. *Re Young and Township of Binbrook*, 108.

'3. *Fire Limits By-law—Consolidated Municipal Act 1892, s. 496, s.s. 10—Right to Maintain Action for Breach of.*—Where a statute provides for the performance of a particular duty, and some one of a class of persons, for whose benefit and protection the duty is imposed, is injured by the failure of the person required to do so to perform it, an action, *prima facie*, and if there is nothing to the contrary, is maintainable by such person; but where the particular course of conduct is imperative and the non-performance is, in the general interest, punishable by penalty, an action will not lie.

Where, therefore, under authority conferred by s.s. 10, s. 496, of the Consolidated Municipal Act 1892, a by-law was passed by a council of a city, setting apart certain areas as fire limits

where no wooden buildings could be erected, and providing that buildings erected in contravention thereof might be pulled down and removed by the corporation at the cost of the owner, and a penalty of \$50 was imposed, the erection of a wooden building within such limits does not give a right of action to the owner of contiguous property which is injuriously affected thereby. *Tompkins v. The Brockville Rink Co.*, 124.

4. *Negligence—Child Playing on Highway—Repair—Death of Child—Damages.*—A municipality is liable for damages arising through its negligence to children playing upon the highway where there is no general law limiting this liability in that regard and no local law prohibiting their playing on the highway and when their presence is not prejudicial to the ordinary uses of the street for traffic and passage.

Judgment of FALCONBRIDGE, J., p. 180, reversed.

In an action by a parent for the death of his child through negligence it is not necessary to shew any pecuniary advantage derived from the deceased, it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit in the future capable of being estimated.

Judgment of OSLER, J.A., in *Blackley v. Toronto Street R. W.*

Co., 27 A. R., at p. 44 note, followed. *Ricketts v. Village of Markdale*, 610.

5. *Arbitration as to Lands Injuriouly Affected—Costs—Discretion—R.S.O. ch. 223, ss. 437, 448, 460.*]—The power given by the Municipal Act, R.S.O. ch. 223, s. 460, to arbitrators under that Act "to award the payment by any of the parties to the other of the costs of the arbitration, or of any portion thereof," should receive the same construction as Consolidated Rule 1130; the discretion given is a legal discretion, and subject to the rule that when the claimant has been guilty of no misconduct, omission or neglect such as to induce the Court to deprive him of his costs, the unsuccessful party should bear the whole costs of the litigation. *In re Puttullo and the Corporation of the Town of Orangeville*, 192.

6. *By-law — Regulation of Hawkers—R.S.O. ch. 223, s. 583, ss. 14 — Proviso—Negating Exception — Conviction — Quashing—Costs.*]—A by-law of a county council recited the provisions of s.s. 14 of s. 583 of the Municipal Act, R.S.O. ch. 223, and that it was expedient to enact a by-law for the purpose mentioned in the sub-section; it then went on to enact "that no person shall exercise the calling of a hawker, peddler or petty

chapman in the county without a license obtained as in this by-law provided;" but the by-law contained no such exception as is mentioned in the proviso to s.s. 14, in favour of the manufacturer or producer and his servants:—

Held, that the by-law was *ultra vires* the council, and a conviction under it was bad.

Held, also, following *Regina v. McFarlane* (1897), 17 C.L.T. Occ. N. 29, that the conviction was bad because it did not negative the exception contained in the proviso, and there was no power to amend it, because the evidence did not shew whether or not the defendant's acts came within it.

The conviction was therefore quashed, but costs were not given against the informant. *Regina v. Smith*, 224.

7. *Local Improvements—Block Pavements—Liability to Repair—Reconstruction—R.S.O. ch. 223, s. 666—62 Vict., sess. 2, ch. 26, s. 41.*]—A city corporation having, by by-law passed in 1888, adopted the local improvement system, a cedar block pavement was constructed as a local improvement in 1891, its "lifetime," as stated by the by-law for levying the assessments therefor, being ten years.

Sections 664 and 665 of the Municipal Act, R.S.O. ch. 223, authorize the passing of by-laws providing for the construction

of local improvements and the making of assessments therefor.

Section 666 provides that "nothing contained in the two preceding sections shall be construed to apply to any work of ordinary repairs or maintenance, and all works or improvements constructed under the said sections shall thereafter be kept in a good and sufficient state of repair at the expense of the * * city * * generally."

Held, that what the legislature contemplated was that the initial cost of the construction of the local work or improvement should be borne by the owners of the property benefited by it, but that they should not be responsible for the keeping of it in repair, that duty being cast upon the municipality generally, and that when it should become necessary to reconstruct the work or improvement, the cost of doing so should be defrayed by the owners of the property benefited by the work of reconstruction.

Held, also, that this duty to repair is imposed upon the municipality for the benefit of those at whose expense the work or improvement has been made; and is not to be confounded with the general duty to repair, which is one towards the public.

Held, also, that this duty ends when it becomes necessary to reconstruct the work or improvement, and that whenever it is in such a condition that

practical men would say of it that it is worn out and not worth repairing, no order for repair can be made under the amendment to s. 666 contained in s. 41 of 62 Vict., sess. 2, ch. 26.

Seemle, that if the dilapidated condition of the pavement were due to the municipality having in the past neglected the duty to repair, the result would be different, the Amending Act of 1899 being applicable to cases where the breach took place before it was passed. *Re Medland and City of Toronto*, 243.

8. *By-law—License—Delegation of Power to Cancel.*—A municipal corporation cannot delegate to a board of health power to cancel a license which it may have under 62 Vict., 2nd sess., ch. 26, s. 37 (2) (O.). *Re Foster and the Corporation of the City of Hamilton*, 292.

9. *By-law—Transient Traders Sale—Trading Stamps—Conviction—R.S.O. ch. 223, s. 583, s.ss. 30, 31.*—The defendant arranged with various retail merchants that each should receive from him trading stamps the property in which, however, was to remain in him, and should pay him fifty cents per hundred stamps, and give one to each customer for every ten cents of cash purchases, while the defendant should advertise the merchants in certain directories and otherwise. A blank

space was left in these directories for pasting in such stamps, and every customer who brought to the defendant one of the directories with a fixed number of stamps pasted in was entitled to receive in exchange any article he might select out of an assortment of goods kept in stock by the defendant. Apart from this the goods were not for sale:—

Held, that these transactions did not constitute a selling or offering for sale by the defendant within the meaning of a municipal by-law, passed under R.S.O. ch. 223, s. 583, s.ss. 30, 31. *Regina v. Langley*, 295.

10. *By-laws Creating Debts—Local Improvement Debt—Validity of the By-law—Directory Provision—R.S.O. ch. 223, ss. 384 (10) (d), 685 (2).*—The provision in R.S.O. ch. 223, s. 685 (2), that it shall be sufficient to state in any by-law for borrowing money on the credit of a municipality, that the amount of the general debt of the municipality as therein set forth is exclusive of the local improvement debts secured by special Acts, rates, or assessments, is merely directory, and the omission to observe it is not fatal to a by-law otherwise valid on its face. *Ward v. Municipal Corporation of Town of Welland*, 303.

11. *Notice of Action—Defective Sidewalk—Particulars.*—A notice of action against a

municipal corporation of a claim arising out of a defective sidewalk is sufficient if it states the cause of the accident together with the name of the street and the particular side of the street and reasonable information as to locality so as to enable the corporation to investigate. It is not necessary to mention the exact locality. *McQuillan v. Municipal Council of Town of St. Mary's*, 401.

12. *Administration of Justice—Detection of Crime—Constable's Services and Expenses—Payment for—Certified Account—R.S.O. ch. 101, s. 12.*—The gist of section 12 of R.S.O. ch. 101, is to empower a Warden and County Attorney to authorize any constable or other person to perform special services not covered by the ordinary tariff, which are in their opinion necessary for the detection of crime or the capture of persons believed to have committed serious crimes, and to do so upon the credit of the county, and so to render the county liable for the payment for such special services, and that whether the account is certified by the Warden and County Attorney as required by the said section or not. *Sills v. Corporation of County of Lennox and Addington*, 512.

13. *Municipal Election—Qualification of Alderman—Title by Possession*—"Partly

Freehold and Partly Leasehold—*Meaning of.*]—In *quo warranto* proceedings under the Municipal Act, it is permissible to join two or more persons in the one motion only when the grounds of objection apply equally to both.

Where, therefore, the ground of objection was as to the qualification of two aldermen, which was separate and distinct, the joining of the two in one motion was held to be improper.

Property which had been in the undisputed possession of an elected candidate for fourteen years, he paying no rent nor giving any acknowledgment of title thereto, his title being admitted by the previous owner, who a few days after the election executed a conveyance thereof to him, was held to constitute a sufficient qualification.

The qualification which by section 76 of the Municipal Act is allowed to be "partly freehold and partly leasehold," is satisfied by half the amount being freehold and half leasehold. *Reg. ex rel. Burnham v. Hagerman and Beamish*, 636.

Lowering Grade to Highway—*Arbitrators*—*Power of Awarding Compensation to Landowner.*]—See ARBITRATION AND AWARD, 1.

Police Magistrate—*Accommodation*—*Stationery.*]—See POLICE MAGISTRATE.

Electric Railway—*Railway*

Committee of Privy Council—*Right of Way*—*Jurisdiction*—*Injunction.*]—See RAILWAYS, 1.

Ditches and Watercourses—*Engineer*—*Appointment of*—*Award*—*Revocation of Appointment*—*Consent of Ratepayer.*]—See DITCHES AND WATERCOURSES ACT.

County Council—*Appeal from By-law of Township Council*—*Altering Boundaries of School Section.*]—See PUBLIC SCHOOLS, 2.

Erection of Buildings—*By-law Authorizing Contract*—*Waiver.*]—See CONTRACT, 3.

NEGLIGENCE.

Trespass—*Dangerous Article near Highway*—*Infant.*]—Plaintiff, a boy of twelve years of age, passing along the highway entered upon defendants' property, which adjoined it, and taking a fog signal out of a box on a hand car standing there, struck the fog signal with a stone when it exploded injuring him:—

Held, that the defendants were not liable.

Judgment of ARMOUR, C.J., at the trial, affirmed. *McShane v. The Toronto, Hamilton and Bruce R. W. Co.*, 185.

Infant playing on Highway—*Accident.*]—See MUNICIPAL CORPORATIONS, 4.

Railway—Culvert—Duty to Fence.—See RAILWAYS, 3.

Foreman—Evidence of.—See MASTER AND SERVANT, 2.

NOTICE.

Sale of Land—Unregistered Agreement—See REGISTRY LAWS.

NOTICE OF ACTION.

Municipal Corporation—Defective Sidewalk—Locality.—See MUNICIPAL CORPORATIONS, 11.

ONUS OF PROOF.

Undue Influence—Parent and Child—Gift—Presumption.—See GIFT.

See PATENT OF INVENTION, 1.

“ FRAUDULENT CONVEYANCE.

PARENT AND CHILD.

Fiduciary Relationship—Influence—Presumption—Gift—Onus.—See GIFT.

PARTIES.

Joint Covenantees in restraint of Trade.—See COVENANT.

PATENT FOR INVENTION.

1. *Process and Product—Purchaser of Articles Infringing—Profits and Damages—Accounts—High Court—Final*

Court of Appeal—Deference to Other Courts—Onus of Proof.]

—A patent granting the exclusive right of making, constructing, using and selling to others to be used, an invention as described in the specifications setting forth and claiming the method of manufacture protects not only the process but the thing produced by that process, and an action will lie against any person purchasing and using articles made in derogation of the patent no matter where they came from: and although the plaintiff cannot have both an account of profits and also damages against the same defendant, he may have both remedies as against different persons (*e.g.*, maker and purchaser) in respect of the same article.

A keeping of the accounts pending the action against the importers does not operate as a license to justify the sale of the articles; it is only an expedient to preserve the rights of all parties to the close of the litigation.

As the infringing articles were manufactured in the United States and brought into Canada for sale, there was sufficient evidence given that they were made according to the plaintiff's process to throw the onus on the defendants of showing the contrary.

Although the High Court may be a final Court of Appeal it will defer to previous cases

decided affirming the validity of a patent and follow the Court of Appeal in refusing to disturb a decision in the Exchequer Court.

Earlier and later American cases commented on. *Toronto Auer Light Company (Ltd.) v. Collins*, 18.

2. *Subsequent Patent—Improvement on First Patent—Assignees of First Patent—Rights of.*]—The defendant and another, who had acquired by assignment from the inventor a patent for making fuel from garbage, etc., assigned to the plaintiff one-third interest therein and all improvements and amendments thereto, it being also contemplated that the invention could and would be utilized for making gas. The defendant subsequently procured a patent for making gas from such garbage, etc., the ingredients used in the production under the second patent being the same or the equivalents of those used under the first patent, any alleged change therein being designed merely to enable the defendant to appear to employ different materials, while in substance and effect the same; his dealings also with the plaintiff, after he had procured the second patent were on the footing that the plaintiff was to have the same interest therein as in the first patent.

A claim by the plaintiff that

he was entitled to the benefit of the second patent as an improvement within the meaning of the first patent under the terms of the assignment was upheld.

It was not necessary that the second patent should have been an infringement of the first one to enable the plaintiff to claim it as an improvement, the word "improvement" within the meaning of the assignment not being used in a technical sense nor as having any defined legal meaning, but according to its popular use, for the parties were dealing not with a particular composition described in the first patent but with the development of the central idea underlying it. *Watson v. Harris*, 134.

PENALTY.

See CONTRACT, 1.

Breach of Fire Limits By-law.—Right of Action.]—*See* MUNICIPAL CORPORATIONS, 3.

POLICE MAGISTRATE.

"*Police Office*" — *Municipal Corporation — Accommodation — Stationery.*]—The police magistrate of a town cannot require the municipal corporation to provide facilities for the transaction of business not strictly appertaining to his office of police magistrate, such as business relating to an adjoining county of which he is a justice

of the peace, nor is he entitled to a private office in addition to a public one. It is sufficient if a suitable room or chamber for a police office is provided in any building belonging to the municipality (in this case the council chamber) although by doing so the hours for the transaction of police business may be limited.

A municipal corporation is liable to a police magistrate for a claim for stationery, although extending beyond a year. *Mitchell v. Corporation of Town of Pembroke*, 348.

PRACTICE.

Proceedings by Chief of Police to Enforce By-law—Style of.—See SESSIONS, 2.

PRINCIPAL AND AGENT.

Sale of Land—Land Agent—Commission.]—The defendant, knowing that the plaintiff was a land agent, arranged with him to procure a purchaser for his house and lot at a named price. Through the plaintiff's intervention a proposed purchaser was procured and a purchase discussed. Subsequently, and as a result of the discussion, a lease was entered into of the premises for three years, with a collateral agreement giving the purchaser the option of purchasing within a year, which he exercised:—

Held, that the plaintiff was entitled to his commission from

the defendant. *Morson v. Burnside*, 438.

Insurance Company—Local Agent—Authority.]—See INSURANCE, 6.

PRINCIPAL AND SURETY.

Indorsing before Payee.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

PROHIBITION.

Division Courts—Examination of Judgment Debtor—Government Official—Order for Payment—Committal.]—A County Court Judge has jurisdiction under R.S.O. ch. 60, s. 247, as amended by 61 Vict., ch. 15, s. 4 (O.), in an action in a Division Court after the examination of, and an order for payment by, a judgment debtor who is a Government official, to commit him for default in payment, although he has no other source of income than his official salary.

Prohibition refused. *Re Hyde and Cavan*, 189.

PUBLIC SCHOOLS.

1. *Trustee—Residence.*]—The defendant, a life tenant of a farm, in the township of Albion, lived on it from 1888 until 1894, when he rented it to his son and went to live with his wife and family on a farm owned by his wife, in the township of Cale-

don, where he continued to live until 1898, when the son having given up possession of the Albion farm, he took possession of it, to enable him to work it, sleeping in the house, and occasionally visiting his wife and family who remained in Caledon, and remaining there over night, while the wife occasionally visited him, staying a couple of weeks:—

Held, that the defendant's place of residence was where his wife and family lived, and he was therefore not a resident within the township of Albion so as to qualify him as a trustee of a school section within that township to which he had been elected: but as the granting of the order for a *quo warranto* was in the discretion of the Court, and the term of the defendant's office would expire before the issue could be tried, the motion was dismissed without costs.

Subs. 8 of s. 14 of R.S.O. ch. 292, providing for an investigation as to the election by the inspector would not of itself prevent the granting of such order. *Reg. ex rel. Horan v. Evans*, 448.

2. *County Council—Appeal from Township By-law—Alteration of School Section—Appointment of Arbitrators—Discretion—R.S.O. ch. 292, s. 39, s.s. 3.*]—The provisions of s.s. 3 of s. 39 of the Public Schools Act, R.S.O. ch. 292, whereby a county council may appoint

arbitrators to hear an appeal against a by-law of a township council altering the boundaries of a school section are permissive, not imperative.

Judgment of ARMOUR, C.J., reversed. *Re Wooliver and the Corporation of the County of Kent*, 606.

QUO WARRANTO.

Proximate Expiry of Office—Dismissal.]—See PUBLIC SCHOOLS, 1.

Municipal Elections—Joinder of Parties.]—See MUNICIPAL CORPORATIONS, 13.

RAILWAYS.

1. *Order of Railway Committee of Privy Council of Canada—Junction of Electric Railway with Canadian Pacific Railway—Laying Switch on Highway—Power to Authorize—Consent of Municipality—Expropriation of Right of Way—Injunction—Enforcement of Agreement.*]—The defendants were a company incorporated under statutes of the Province of Ontario, operating an electric railway upon Yonge Street, between the town of Newmarket and the city of Toronto, with its southern terminus in the northern part of the city, a few yards north of the Canadian Pacific Railway lines. By order of the 23rd November, 1899, the Railway Committee of the Privy

Council of Canada, reciting the consent of counsel on behalf of the corporation of the city of Toronto, approved of the defendants connecting their tracks with the tracks of the Canadian Pacific Railway by means of a switch, as shewn on a plan annexed to the order, and on the conditions imposed by the order:

Held, that the defendants had not the right, without the authority or consent of the city corporation, to occupy or expropriate or otherwise to force their way over a part of Yonge Street within the limits of the city so as to enter the lands of the Canadian Pacific Railway Company and make the proposed junction. The order of the Railway Committee was to be regarded as dealing only with the mode of junction or union, and not as professing to expropriate a right of way over the highway. And the consent of counsel for the city corporation, when before the Railway Committee, was to be viewed in the same way. Section 173 of the Railway Act of Canada does not give the Railway Committee power to expropriate land or to deal with the right of property. The protection of the crossing or junction is the object of the Committee, which has to approve of the place and mode thereof, and which is not concerned, so far as this section applies, with how the railways arrive at the point of union.

Held, also, that the defendants had not, by virtue of any statute or agreement, viewing their road as a mere street railway, the right to expropriate the right of way; and even if their road was a railway within the meaning of the Railway Act, section 183 was not applicable, for the proposition here was not to carry the tracks "along an existing highway;" and they could not avail themselves of section 187, for the provisions of law applicable to the taking of land by the company had not been complied with.

The plaintiffs were therefore entitled, without derogation of the order of the Railway Committee, to an injunction restraining the defendants from effecting the proposed junction by the method shewn on the plan.

By an agreement made between the plaintiffs and defendants, the defendants agreed that, upon receiving at any time twenty-four hours' notice from the plaintiffs' engineer, they would cease running their cars by electricity on the portion of Yonge Street within the city limits:—

Held, that, nothing having occurred to operate as a waiver by the plaintiffs of this term of the agreement, and the notice having been duly given, the plaintiffs were entitled to an injunction restraining the defendants from propelling their cars by electricity within the limits

of the city. *City of Toronto v. Metropolitan R.W. Co.*, 367.

2. *Tolls Not Fixed by Governor-General—Penalty—Right to Recover Back—51 Vict., ch. 29, s. 227 (D)—County Court Appeal—Setting Down—R.S.O. ch. 55, s. 57—Cons. Rule, 795.*]

—The fact that a railway company has not had its tolls approved by the Governor-General under 51 Vict., ch. 29, s. 227 (D), does not in itself entitle a passenger who has paid such tolls to recover three times the amount under section 290, in the absence of evidence that the fares charged were unreasonable or excessive; nor is such passenger entitled to recover back the amount so paid by him as paid under a mistake of fact, where it was such as in equity and good conscience he ought to have paid.

Neither R.S.O. ch. 55, s. 57, nor Cons. Rule, 795, prohibit a County Court appeal being set down to be heard for a sitting of the Divisional Court, commencing within thirty days from the decision complained of. *Lees v. Ottawa and New York R.W. Co.*, 567.

3. *Culvert—Duty to Fence—Negligence.*—A natural water-course, which flowed through a culvert under a railway track, dried up in the summer, and to prevent cattle from passing through it the railway company had placed gates in the culvert, which they neglected to keep

up, and by reason of the absence thereof, of which the company was duly notified, the plaintiff's cattle, which were lawfully pasturing in a field on one side of the track, got through the culvert into a field on the other side of the track, and from thence on to the railway track, where they were injured:

Held, that the defendants were bound to keep the water-course, as part of their railway, properly fenced, and were liable for the damages sustained by the plaintiff. *James v. Grand Trunk R.W. Co.*, 672.

4. *Mortgage—Conveyance of Equity by Mortgagor—Expropriation Proceedings—Right of Mortgagor to Notice of.*] A mortgagor who has conveyed his equity of redemption subject to the payment of the mortgage is not entitled to notice of expropriation proceedings taken by a railway company with regard to the mortgaged lands; and the absence of such notice does not constitute any defence to an action brought against him by the mortgagee on a covenant to pay the mortgage money. *Farr v. Howell*, 693.

Street Railway—Frightening Horses—Duty of Motor Man.]
—See STREET RAILWAY.

RAILWAY COMPANY.

1. *Carriage of Goods—Condition Limiting Liability for Loss—51 Vict., ch. 29 (D).*—

Canadian Company—Part of Line in Foreign Country.—The Railway Act of Canada is not applicable to a railway situate in a foreign country, though operated by a company incorporated by or under the authority of the Parliament of Canada.

Therefore, where goods shipped from Scotland to be delivered at Portland, Maine, U.S., to the Grand Trunk Railway Company, and by that company to be forwarded thence to the plaintiffs at Toronto, were destroyed by fire on the line of that company in New Hampshire, U.S., by negligence from which they were protected from liability by the terms of the contract for carriage:—

Held, that the provisions of sec. 246 of 51 Vict. ch. 29 (D.), disabling a railway company from relieving itself from liability for its own negligence or that of its servants, were not applicable to the defendants' contract; and an action to recover damages for the loss of the goods failed. *Macdonald v. Grand Trunk R.W. Co.*, 663.

See ASSESSMENT AND TAXES, 1.

RECEIVER.

1. *Mortgage — Purchaser of Equity — Covenant to Indemnify.*—A judgment creditor of a mortgagor upon covenants in the mortgage cannot obtain a

receivership order to enforce payment by a purchaser of the equity who, on purchasing, has agreed to assume and pay the mortgage, though he sue and make the application on behalf of himself and all other creditors of the mortgagor. *Palmer v. McKnight*, 306.

2. *Life Policy — Security for Money*—*R.S.O. ch. 77, s. 18.*—The plaintiffs, judgment creditors, were held entitled to a receivership order in respect to the defendant's interest in a fully paid up life policy which he had assigned to the plaintiffs as security, reserving to himself the cash surrender value of the bonus additions.

A paid up policy is a "security for money" within *R.S.O. ch. 77, s. 18*, "The Execution Act." *Canadian Mutual Loan and Investment Co. v. Nisbet*, 562.

REGISTRY LAWS.

Will — Annuity — Unregistered Agreement Creating Charge on Land — Notice — Registry Act *R.S.O. ch. 136, s. 87.*—A testator by his will directed his executors to pay his widow an annuity for the support and maintenance of one of his sons until he became of age; and he also directed that if there were not sufficient funds therefor, it was to be a charge on separate parcels of land severally devised to three of his other

sons. There were sufficient funds in the executors' hands for the payment of the annuity, but by an agreement, for valuable consideration, made between the widow and the devisees of the lands, it was agreed that the annuity should not be paid out of the moneys but should be a charge upon the lands, the intention being that the moneys should be kept in hand for the payment of a legacy payable to the first named son on his attaining his majority. A sale was subsequently made by one of the sons of the parcel of land devised to him, the purchaser being informed as to an agreement having been entered into with reference to the annuity, but being at the same time told that it in no way affected the land, merely creating a personal obligation to pay the annuity, and he made no further inquiry with regard to it:—

Held, that the purchaser could not be deemed to have purchased the land with actual notice of the contents of the agreement so as to be affected thereby. *Coolidge v. Nelson*, 646.

REMEDY.

See CONTRACT, 1.

REPLEVIN.

Indemnity of Defendant — *Replevin Bond* — *Consolidated Rule 1074.* — The Consolidated

Rule 1074, dealing with the question of indemnity of the defendant in replevin proceedings, is the Statute 48 Vict. ch. 13, s. 8 (O.) imported into the Rules, and does not give an independent cause of action, merely adding another condition to the replevin bond required to be taken by the sheriff. *Harper v. Toronto Type Foundry Co.*, 422.

RESIDENCE.

School Trustee. — See PUBLIC SCHOOLS, 1.

RES JUDICATA.

Reported Reasons for Judgment — *Premature Action* — *Second Action for Same Cause.* — See ESTOPPEL.

RESTRAINT OF TRADE.

See CONTRACT, 1.

REVENUE.

1. *Succession Duty* — *R.S.O. ch. 24* — *Bank Deposit Receipts* — *Foreign Domicile.* — Succession duty is payable upon deposit receipts issued by banks in this Province, payable here to a person whose domicile was in a foreign country at the time of his death. *A.G. of Province of Ontario v. Newman*, 340.

RULES OF COURT.

Cons. Rule 1130.]—See MUNICIPAL CORPORATIONS, 5.

Cons. Rule 795.]—See RAILWAYS, 2.

Cons. Rule 1074.]—See REPLEVIN.

SALE OF GOODS.

1. *Engine — Warranty for Return of Article.*]—Where in a contract for the sale of a gasoline engine and tank there was a warranty that if the engine would not work well, notice thereof was to be given to the defendants, stating wherein it failed, and giving a reasonable time to get to it and remedy the defect, and if such defect could not be remedied, the engine was to be returned to the defendant and a new engine given in its place:—

Held, that the plaintiff's remedy under such warranty was for the return of the engine and its replacement by another engine, and not for damages for breach of warranty. *Hamilton v. Northey Manufacturing Co.*, 468.

2. *Specific Article—Warranty—Parol Evidence.*]—Under a written contract for the sale by description of a specific article, namely, a gasoline engine with a pump standard, it not being pretended that it did not answer such description, such contract

must be taken to cover, as it purported to do, the whole contract between the parties, and parol evidence is not admissible to shew a warranty made prior to the entering into of the contract which is inconsistent with the written warranty, as it would be allowing the admission of parol evidence to control, vary, add to or subtract from the written contract; and statements alleged to have been made by the vendors, and acted on by the purchaser, to the effect that the engine would pump sufficient water for a certain number of horses and cattle were not such as to constitute a separate and independent collateral agreement, and admissible in evidence as such. *Northey Manufacturing Co. v. Sanders*, 475.

3. *Sale of Goods—R.S.O. ch. 150—Factors Act—"Agent"—"Entrusted"—Innocent Purchaser.*]—The word "agent" referred to in R.S.O. (1897) ch. 150, "An Act respecting contracts in relation to goods entrusted to agents," means one who is entrusted with the possession as agent in a mercantile transaction for the sale, or for an object connected with the sale of the property.

And an agent who has obtained possession of certain lumber from the master of a vessel without authority from the owner was:—

Held, not to have been en-

trusted with the possession, and that the owner was entitled to recover the value of the lumber from a *bonâ fide* purchaser from, and who had paid the agent. *Moshier v. Keenan*, 658.

SALE OF LAND.

Vendor's and Purchaser's Act—*District Court—Jurisdiction.*]—*See* DISTRICT COURTS.

Notice—Unregistered Agreement Creating Charge.]—*See* REGISTRY LAWS.

Free Grant—Locatee—Agreement for Grant after Patent Issued—Validity of.]—*See* CROWN, 2.

Registered Plan—Public Highway—Dedication and Acceptance.]—*See* WAY.

Commission—Lease with Option of Purchase.]—*See* PRINCIPAL AND AGENT.

See, also, VENDOR AND PURCHASER.

SEPARATE ESTATE.

Married Woman—Funeral Expenses.]—*See* HUSBAND AND WIFE.

SESSIONS.

1. *Appeal to, from Order of—Dismissal of Complaint—Offence under By-law—Municipal Act, R.S.O. ch. 223, s. 551—*

R.S.O. ch. 90, s. 7.]—There is no appeal to the Court of General Sessions of the Peace from an order of dismissal of a complaint for an offence against a city by-law passed under the authority of s. 551 of the Municipal Act, R.S.O. ch. 223.

The "order" referred to in s. 7 of R.S.O. ch. 90, "The Ontario Summary Convictions Act," means an order against the party against whom the information and complaint is laid, and does not include an order of dismissal.

Reg. v. Toronto Public School Board, 457.

2. *Costs—Duration of—Jurisdiction—Formal Order—Criminal Code—55-56 Vict., ch. 29, ss. 880, 884 (D.).*]—Where the chairman of the General Sessions of the Peace made a minute of dismissal of an appeal from the conviction of a police magistrate, with costs to be taxed by the clerk of the peace, but no formal order was drawn up in pursuance of such minute:—

Held, that a certificate of the clerk as to the amount of such costs and a subsequent order of the Court of General Sessions directing a distress warrant to issue in respect of the same were irregular and must be quashed.

If such formal order had issued the certificate might have been upheld, although the appell-

ant was bound by recognizance conditioned to pay them.

Freeman v. Read (1860), 9 C. B.N.S. 301, specially referred to.

Held, also, that in view of s. 880 (e) (f) of the Criminal Code, 55-56 Vict., ch. 29 (D.), the formal order might have been drawn up at any future sittings of the Court of General Sessions and the costs included therein *nunc pro tunc* if necessary, the power to determine the amount of such costs not being, as it is in England, confined to the justices at the same General Sessions at which the appeal is heard.

Where proceedings are taken by the chief of police of a town and in his name for an offence against a by-law of the town, his name and not that of the town should appear throughout the proceedings as the informant.

Re Bothwell and Burnside, 695.

SOLICITOR.

Assignment of Mortgage — Fraud of Solicitor.]—See MORTGAGE, 2.

SPECIFIC PERFORMANCE.

Land out of Ontario — Jurisdiction.]—The plaintiff, a resident of Buffalo, United States, agreed in writing with the defendant, to exchange certain land situate in Buffalo for land of the defendant situate in Ontario; and brought this action for specific performance of the contract:—

Held, that the plaintiff having brought his action in this Court, thereby submitting to its jurisdiction, the Court would decree specific performance.

Montgomery v. Ruppensburg, 433.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTES.

35 Vict. ch. 80, ss. 11, 13, (O.)	679
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42 Vict. ch. 78, s. 7, (O.)	679
See COMPANY, 4.	
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R.S.O. ch. 51, s. 185	542	R.S.O. ch. 203, secs. 151, 160	452
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R.S.O. ch. 59, s. 36	167	R.S.O. ch. 223, secs. 384 (10) (d.), 685 (2)	303
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R.S.O. ch. 60, s. 152	677	R.S.O. ch. 223, s. 460	192
See DIVISION COURTS, 2.		See MUNICIPAL CORPORATIONS, 5.	
R.S.O. ch. 60, s. 247	189	R.S.O. ch. 223, secs. 458, 465	262
See PROHIBITION, 1.		See ARBITRATION AND AWARD, 1.	
R.S.O. ch. 77, s. 18	562	R.S.O. ch. 223, s. 551	457
See RECEIVER, 2.		See SESSIONS, 1.	
R.S.O. ch. 90, s. 7	457	R.S.O. ch. 224, s. 583, s.s. 14	224
See SESSIONS, 1.		See MUNICIPAL CORPORATIONS, 6.	
R.S.O. ch. 101, s. 12	513	R.S.O. ch. 223, s. 583, s.s. 30, 31	295
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See, also, CONSTITUTIONAL LAW.	

STATUTORY CONSTRUCTION.

Inconsistent Clauses.]—See INSURANCE, 3.

STREET RAILWAY.

Operation of Electric Car—Duty of Motor Man—Frightening Horses—Nonsuit.]—It is the duty of a motor man, operating an electric car upon a public street, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse; and it is also his duty in running the car to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams.

Ellis v. Lynn and Boston S. R. Co. (1893-4), 160 Mass. 341, applied.

Held, in this case, STREET, J., dissenting, that the fair inference from the evidence was that the motor man saw the plaintiff's

horses were becoming frightened by the moving car, and that they were likely to become unmanageable and run away, and that he saw the signal given by the plaintiff and understood it to be a signal for him to stop the car; and it was his duty, under these circumstances, to do what he reasonably could to avoid the obvious danger, and the case should not have been withdrawn from the jury. *Myers v. Brantford Street R. W. Co.*, 309.

Reversed on appeal.

SUCCESSION DUTY.

Bank Deposit Receipt—Foreign Domicile.]—See REVENUE, 1.

SUBROGATE COURT.

Appeal.]—See APPEAL.

TRADE MARK.

1. *Trade Description—False Application of*—“*Quadruple Plate*”—*Evidence.*]—The defendants by an advertisement in a newspaper described certain tea-sets as “quadruple plate,” stating that the regular price thereof was “\$12.00 a set, Saturday at \$6.00.” The purchaser of one of the sets, before making his purchase, inquired, and was informed, by the saleswoman of the defendant, that it was one of the tea-sets advertised, and that the advertisement could be relied upon:—

Held, ROSE, J., dissenting on this point, (1) that the use of the words "quadruple plate" in the advertisement was an application of false trade description, in that the goods could not properly be described as such; (2) that there was evidence to show that the advertisement applied to these goods. *Regina v. The T. Euton Co. (Limited)*, 276.

TRANSIENT TRADERS.

By-Law—Trading Stamps.
—See MUNICIPAL CORPORATIONS, 9.

TRIAL.

Good Friday—Dies Non Juridicus.] — The evidence at the trial of this action not being concluded before the close of the day preceding Good Friday, the Judge, counsel consenting and the jury desiring it, adjourned the Court to the following day, when he delivered his charge and received the verdict, on which he entered judgment:—

Held, that it was competent for him to do so.

The only day on which no judicial act can be done in this Province is the Lord's Day, or Sunday. Other statutory holidays are not *dies non juridici* in this sense. *Foster v. Toronto Railway Co.*, 1.

See PATENT FOR INVENTION, 1.

UNDUE INFLUENCE.

Fiduciary Relationship—Onus—Presumption—Benefit.
—See GIFT.

USE AND OCCUPATION.

See COMPANY, 1.

VENDOR AND PURCHASER.

Purchase Subject to Mortgage—Indemnity—Executors and Administrators—Claim on Administrator—Limitation of Actions—R.S.O. ch. 129, s. 35.
—A sale of land for \$275 on which there was a mortgage for \$1,100, the conveyance being by the ordinary short form deed, the only reference to the mortgage being in the covenant for quiet enjoyment, was, under the circumstances, held to have been a sale subject to the mortgage, against which the vendor was entitled to be indemnified by the purchasers; and the plaintiff having acquired an assignment of such right of indemnity, he was entitled to enforce it against the purchasers.

Before the commencement of an action against the purchasers one of them died, and on the plaintiff notifying the administrator of his claim, he was served with a notice under s. 35 of R. S.O. ch. 129, the "Trustee Act," disputing it. An action was afterwards brought against such

administrator, but, on it appearing that he was then dead, and that an administrator *de bonis non* had been appointed, an order was obtained amending the writ by substituting as defendant such last named administrator, upon whom the writ was served more than six months after the service of the notice:—

Held, that the proceedings against the defendant must be deemed to have commenced only on the service of the writ on him, and this being more than six months from the service of the notice, the plaintiff's action was barred. *Gooderham v. Moore*, 86.

See, also, SALE OF LAND.

VOTERS' LISTS.

Farmers' Sons and Income Voters—By-law.—*See* MUNICIPAL CORPORATIONS, 2.

WARRANTY.

Sale of Engine—Parol Evidence—Supplementary Statements.—*See* SALE OF GOODS, 2.

For return of Article—Sale of Engine.—*See* SALE OF GOODS, 1.

WAY.

Highway—Dedication and Acceptance—Registered Plan—Statutory Regulations—

Sale of Land by Reference to it.]

—Plaintiff's vendor of a lot on a plan registered by him had, prior to the sale to plaintiff, given for the purpose of extending a street the north twenty feet by the entire depth of the lot, the owner of the adjacent property also giving twenty feet for the same purpose. The latter then registered a plan showing the street as sixty feet wide opposite the lot subsequently sold to plaintiff. This plan, although not conforming to statutory requirements, was authorized by resolution of the town council to be registered, and they accepted the street thereon forty feet in width, the figures on the plan, however, showing the street opposite the lot in question to be sixty feet wide, but no reference was made to the former plan. Other lots were sold according to the last plan, and there was evidence of public user of and of the expenditure of public moneys on the street, and that a sidewalk had been laid down defining the width at sixty feet. The plaintiff afterwards purchased the lot mentioned according to the first plan, and moved his fence out to the original boundary of the lot:—

Held, that the twenty feet encroached on by the plaintiff had become part of the public highway. *Pedlow v. Corporation of the Town of Renfrew*, 499.

WILL.

1. *Specific Bequest to Widow—Dower—Election.*—An estate consisting of realty and personalty and amounting to over \$10,000, was, after a direction to pay the debts, funeral and testamentary expenses, and after a specific devise of certain land, devised by the testator to his executors in trust to sell and convert into money, and out of the proceeds to pay to his widow \$3,000 for her own use absolutely, and to divide the remainder among certain nephews and nieces:—

Held, that the widow was not put to her election, but was entitled to her dower in addition to the bequest.

Amnden v. Kyle, 9 O.R. 439, distinguished. *Re George Shunk Estate*, 175.

2. *Devise Over—Impossibility of Event—"And"—Lifetime of Two Persons—Death of One.*—A testatrix devised and bequeathed all her real and personal estate to her son in fee with a proviso that in case he

should die without issue previous to the death of "my brother * * and sister * *," then over.

The sister mentioned died in the lifetime of the son:—

Held, that as the event, viz., the death of the son previous to the death of both the brother and sister, could not happen, the son took an estate in fee simple. *Lillie v. Willis*, 198.

Annuity by—Charge of Lands—Lapse of Time.—See LIMITATION OF ACTIONS, 1.

WORDS.

"Agent," "Entrusted."—See SALE OF GOODS, 3.

"Security for Money."—See RECEIVER, 2.

"Untenanted," "Unoccupied."—See INSURANCE, 5.

"Order."—See RAILWAY COMPANY, 1.

See SESSIONS.

"Purchased from Owner."—See ASSESSMENT AND TAXES, 3.

"Accuses."—See CRIMINAL LAW, 3.





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